(19)

No. 94-780-CFX
Status: GRANTED

Docketed:
October 24, 1994

Title: Capitol Square Review and Advisory Board, et al., Petitioners
v.
Vincent J. Pinette, Donnie A. Carr and Knights of the Ku Klux Klan

Court: United States Court of Appeals for the Sixth Circuit

Counsel for petitioner: Renner,Michael J.

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Entry	Date	Note	Proceedings and Orders
1	Oct 24 1994	G	Petition for writ of certiorari filed.
3	Nov 22 1994		Brief amici curiae of American Jewish Congress, et al. filed.
2	Nov 25 1994		Brief of respondents Vincent Pinette, et al. in opposition filed.
4	Nov 30 1994		DISTRIBUTED. January 6, 1995 (Page 3)
5	Dec 1 1994	X	Reply brief of petitioners filed.
7	Jan 9 1995		REDISTRIBUTED. January 13, 1995 (Page 19)
8	Jan 13 1995		Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, February 23, 1995. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, March 23, 1995. Rule 29.2 does not apply. **********
9	Feb 2 1995		SET FOR ARGUMENT WEDNESDAY, APRIL 26, 1995. (1ST CASE).
10	Feb 13 1995		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Sixth Circuit.
11	Feb 21 1995		Joint appendix filed.
12	Feb 21 1995		Brief of petitioners Capitol Square Review and Advisory Board, et al. filed.
13	Feb 21 1995		Record filed.
		*	Original record proceedings United States District Court for the Southern District of Ohio (BOX)
19	Feb 22 1995		Brief amicus curiae of Freedom From Religion Foundation Inc. filed.
14	Feb 23 1995		Brief amici curiae of American Jewish Congress, et al. filed.
15	Feb 23 1995		Brief amici curiae of Council on Religious Freedom, et al. filed.
16	Feb 23 1995		Brief amici curiae of Trumbull, Connecticut, et al. filed.
17	Feb 23 1995		Brief amici curiae of Americans United for Separation of Church and State, et al. filed.
18	Feb 24 1995		CIRCULATED.
20	Mar 22 1995	X	Brief of respondents Vincent Pinette, et al. filed.
21	Mar 22 1995	X	Brief amicus curiae of Liberty Counsel filed.

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Entry	Date	Note	Proceedings and Orders
22	Mar 23 1995	X	Brief amici curiae of Knights of Columbus Coucil 2961, et al. filed.
23	Mar 23 1995	X	Brief amicus curiae of Christian Legal Society filed.
24	Mar 23 1995	X	Brief amicus curiae of American Center for Law & Justice filed.
25	Mar 23 1995	X	Brief amici curiae of Chabad House of Western Michigan, Inc., et al. filed.
26	Apr 11 1995	X	Reply brief of petitioners filed.
27	Apr 26 1995		ARGUED.

FILED

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OFFICE OF THE CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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15 pp

QUESTION PRESENTED FOR REVIEW

Did the court below err in holding that the State must allow a private group to erect a large, unattended Latin cross directly in front of the Ohio Statehouse, on the ground that a private organization's display of a religious symbol in a public forum, even a public forum closely associated with the seat of government, can never violate the Establishment Clause?

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment entered by the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 30 F.3d 676 (6th Cir. 1994) and is reprinted in the Appendix ("App.") to this petition at A1-A12. The Sixth Circuit's opinion affirmed the December 21, 1994 Order and opinion of the United States District Court for the Southern District of Ohio. The District Court's opinion is reported at 844 F. Supp. 1182 (S.D. Ohio 1993) and is reprinted at App. A13-A26. The Report and Recommendation of the Administrative Hearing Examiner, adopted in full by the Capitol Square Review and Advisory Board, is reprinted at App. A27-A37.

The unreported opinion of the Sixth Circuit denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reprinted at App. A40-A42. The in-chambers opinion of Justice Stevens, sitting as Circuit Justice, denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reported at 114 S. Ct. 626 (Stevens, Circuit Justice 1993) and is reprinted at App. A38-A39.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the Court of Appeals for the Sixth Circuit was entered on July 25, 1994. *See* App. A1. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

INTRODUCTION

This case presents the sole issue of whether a private organization's display of an unattended religious symbol in a public forum can ever violate the Establishment Clause. That issue is manifestly worthy of review. Ten years ago, the Court determined that this precise issue merited review on certiorari, but was unable to resolve it when the Court split 4-4 and thus affirmed without opinion. *Board of Trustees v. McCreary*, 471 U.S. 83 (1985). In the years since, the Court has again noted that the issue remains unresolved, *see County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 600 n.50 (1989), and the Federal Courts of Appeals have explicitly disagreed and criticized one another as they have addressed the issue, *see infra* Part II (identifying and describing the conflicting cases). The issue is framed especially sharply in this case, where the public forum involved is closely associated with the seat of government.

This case involves an unattended private display of the quintessential symbol of the Christian faith -- the Latin cross -- directly in front of the Ohio Statehouse, at the very seat of Ohio state government. It thus squarely poses the issue left unresolved in *McCreary* and *County of Allegheny*, which continues to divide the lower federal courts. It also presents this Court with a substantial and important legal issue that confronts a fundamental tension between basic constitutional principles under the First Amendment, *namely*, whether the effect of the decision below is that "the public forum doctrine would swallow up the Establishment Clause." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990).

STATEMENT OF THE CASE

1. Respondents in this action, the Knights of the Ku Klux Klan (Ohio Realm) and two of their officers, brought this suit originally against the Capitol Square Review and Advisory Board, its executive director, spokesperson, and chairperson. The lawsuit sought in effect to compel the State of Ohio to allow Respondents to erect a large, unattended Latin cross directly in front of the Ohio Statehouse during the Christmas season, between December 8, 1993 and December 24, 1993. Respondents openly acknowledged that their purpose in seeking to erect the display at this location was to erect "a symbol for our Lord, Jesus Christ" in furtherance of their more general purpose to "establish a Christian government in America." Tr. of Dec. 20, 1993 Hearing at 101-02; *id.* at 53-55.

2. The Capitol Square is owned by the State of Ohio and located in downtown Columbus. It is the site of Ohio's state capitol building, also known as the Ohio Statehouse, which is a large rectangular building that centers the Capitol Square. The Ohio Statehouse, which is a distinctive example of Greek Doric architecture, is topped by a large rotunda. For well over a century, it has housed both chambers of the Ohio General Assembly as well as the offices of the Ohio Governor and other statewide officeholders. The Ohio Statehouse is the dominant feature of the Capitol Square, and it is plainly and unavoidably visible from every vantage point on the Capitol Square. *See* App. A43 (photograph). The District Court correctly held in this case that the Capitol Square is a public forum. *Id.* A18.

For the past several years, the State of Ohio has allowed certain holiday seasonal displays to be placed on the Capitol Square for limited periods during the month of December. The State's traditional policy is to allow a

broad range of speakers and other gatherings of people to conduct events on the Capitol Square. These displays are generally an exception to that policy because they are *unattended* structures. The holiday seasonal displays permitted by the State in the past have included a Christmas tree and a menorah. App. A14.

On November 18, 1993, the Capitol Square Review and Advisory Board, which is authorized by law to regulate the uses of the Capitol Square, voted not to permit unattended displays on the Capitol Square during December of 1993. That vote was later declared invalid, and on November 23, 1993, the Board voted to approve displays of a Christmas tree and a menorah. App. A14-A15. The State displayed its own Christmas tree, and a permit application to erect a menorah on the Capitol Square from December 8-16, 1993, which was explicitly stated to be a "seasonal display," was granted.

3. On November 29, 1993, Respondents applied for a permit to display a cross on the Capitol Square from December 8-24, 1993. The application described the type of event as being to "erect a cross for Christmas." Executive Director Keller denied the application on December 3, 1993, "upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." Respondents later clarified that they sought to erect a cross in the style of a Latin cross,[1]

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[1] "Latin cross" is the proper term for any "cross whose base stem is longer than the other three arms." *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir.) (affirming preliminary injunction against display of lighted Latin cross on top of city fire department building during Christmas season because it would violate the Establishment Clause), *cert. denied*, 479 U.S. 961 (1986).

about ten feet high and six feet across and accompanied by an unspecified disclaimer. App. A15.

On December 9, 1993, Respondents filed an administrative appeal of this action to the full Board; the appeal was perfected on December 13, 1993. On December 17, 1993, a state administrative appeal was conducted by a hearing examiner who took evidence and heard argument from both sides. On December 21, 1993, the administrative hearing examiner issued a report and recommendation which found that the initial denial of a permit to Respondents was proper. The hearing examiner held, among other things, that whereas holiday seasonal symbols have by virtue of that association taken on "cultural significance extending well beyond the religious sphere," the Latin cross "is generally regarded as having a purely sectarian purpose (*i.e.*, to advance or endorse the Christian religion)." App. A34-A35. For that reason, the display of a Latin cross directly in front of the Ohio Statehouse, unlike the display of a Christmas tree or a menorah, was held to violate the Establishment Clause. *Id.* A36. The Board unanimously adopted this report and recommendation as its own final ruling later that day.

4. In the meantime, on December 15, 1993, Respondents filed this lawsuit in District Court, asserting that the denial of their application for permit to erect a cross violated their constitutional right of free speech. The court set the matter for hearing on December 20, 1993, and consolidated the hearing on Respondents' motion for a preliminary injunction with a trial on the merits. At the close of this hearing, the court deferred its ruling pending the outcome of the state administrative appeal process. Once that process was completed on December 21, 1993, the court granted a permanent injunction requiring Petitioners to approve a permit for Respondents to display a cross on the Capitol Square through December 24, 1993. App. A26.

In its ruling, the District Court considered whether Respondents' display of a large, unattended Latin cross directly in front of the Ohio Statehouse would constitute an impermissible "endorsement" of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as subsequently interpreted and applied in such "holiday seasonal display" cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny*. On the basis of a recent *en banc* decision by the Sixth Circuit Court of Appeals that addressed essentially the same issue, *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc), the District Court held that the unattended religious display in this case would not constitute an impermissible endorsement of religion so as to violate the Establishment Clause. App. A7-A8.

5. Immediately after the District Court issued its ruling, Petitioners moved for a stay pending appeal, which the court denied. Petitioners filed a Notice of Appeal to the Sixth Circuit on the same day -- December 21, 1993 -- and filed a motion for an emergency stay of the injunction pending appeal, which the Sixth Circuit denied on December 22, 1993. App. A40. Petitioners then filed an emergency application for a stay of injunction with Circuit Justice Stevens, which was denied on December 23, 1993. *Id.* A38. Justice Stevens determined that as Respondents' cross had been up for one day already, and would be up for at most one day more, it was likely that any irreparable harm which may flow from the display of the cross would likely have already occurred, and thus emergency relief was inappropriate at that juncture. *Id.* A39. He also noted that this matter would not become moot, as it is capable of repetition yet evading review, and stated that "[r]ather than asking my colleagues to resolve those issues summarily, applicants may be well advised to marshal their arguments in

a certiorari petition that can be considered with appropriate deliberation." *Id.* A39.

6. Respondents erected a cross on the Capitol Square sometime during the night of December 21, 1993, and it was displayed there the following day until it was apparently vandalized. The cross was displayed by itself in the middle of the lawn directly in front of the Ohio Statehouse, *see* App. A43 (photograph), located at some distance from the Christmas tree.[2] On December 22, 1993, Petitioners received yet another application from a group of Christian ministers, who sought to erect twenty more Latin crosses in front of the Ohio Statehouse. Petitioners believed themselves obligated, by the force of the District Court's ruling, to grant this further application, and thereafter numerous other crosses were erected and displayed in the same vicinity on December 23-24, 1993.[3]

7. On appeal, the Sixth Circuit affirmed the District Court's ruling. Initially, the court correctly noted that this 'case was not moot, under the "capable of repetition, yet evading review" standard enunciated in such decisions as *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). *See* App. A4. On the merits, the Sixth Circuit adhered to its recent *en banc* decision in *Americans United*, which "held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." *Id.* A8. The court focused in particular on the

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[2] The menorah had been removed almost a week earlier, when that permit expired on December 16, 1993.

[3] Appellants subsequently received an application for permit from a minister to erect a Greek Orthodox cross on the Capitol Square from January 2-8, 1994, which is when that church celebrates the holiday season. That application was granted also, based on the District Court's ruling.

nature of the display and the nature of the forum. It essentially held that because this display was privately sponsored, it did not matter what was contained in the display -- for example, a Latin cross in this case as opposed to a menorah in cases like *Americans United* and *County of Allegheny*. Because this display was to be located in a public forum, moreover, it did not matter what kind of location was to exhibit the display -- for example, the Ohio Statehouse in this case as opposed to a public park in cases like *Americans United* and *Lynch*. The Sixth Circuit thus determined that a reasonable observer could not conclude that the State of Ohio endorsed Christianity after viewing a large, unattended Latin cross standing directly in front of the Ohio Statehouse because "'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" *Id.* A9 (quoting *Americans United*, 980 F.2d at 1553) (emphasis in original). On this ground, the Sixth Circuit held that Respondents' display of a Latin cross directly in front of the Ohio Statehouse did not constitute an impermissible endorsement of religion under the Establishment Clause.

REASONS FOR GRANTING THE WRIT

Respondents seek to display the Latin cross, an inherently religious and indeed sectarian symbol, directly in front of the Ohio Statehouse. The Court should grant certiorari to determine whether such an unattended religious display in a location closely associated with the seat of government involves the State in a violation of the Establishment Clause. The Sixth Circuit's entrenched position -- that a privately sponsored religious display erected in a public forum can *never* violate the Establishment Clause, App. A8; *Americans United*, 980 F.2d at 1553 -- is inconsistent with the proper conjunction of this Court's decisions involving holiday seasonal displays, such as *Lynch*

and *County of Allegheny*, and this Court's "equal access" decisions, such as *Widmar v. Vincent*, 454 U.S. 263 (1981).

Moreover, the instant case offers the Court an excellent opportunity cleanly to address and resolve a longstanding issue about the proper relationship between the Establishment Clause and the public forum doctrine under the Free Speech Clause, in the particular context of unattended religious displays. The Court decided to consider and resolve this very same issue when it granted certiorari to review *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd mem.*, 471 U.S. 83 (1985). *See Board of Trustees v. McCreary*, 53 U.S.L.W. 3273 (U.S. 1984) (granting certiorari to consider whether "city is compelled under rule of *Widmar v. Vincent*, 454 U.S. 263 (1981), to allow placement of creche in park for approximately two weeks of Christmas season"). In the end, however, the Court was unable to resolve the issue authoritatively because it was equally divided and thus issued no decision on the merits. *See Board of Trustees v. McCreary*, 471 U.S. 83 (1985). The Court recognized and deferred the same issue again more recently, while noting that it had previously granted certiorari on the issue in *McCreary* without being able to resolve it. *See County of Allegheny*, 492 U.S. at 600 n.50. At an earlier stage of this case, moreover, Justice Stevens stated that Petitioners "may be well advised" to present the issue again before this Court in a certiorari petition. *See* App. A39 (Stevens, Circuit Justice).

Furthermore, the position adopted by the Sixth Circuit on this issue, while aligned with the Eleventh Circuit's decision in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc), directly and expressly conflicts with decisions rendered by the Fourth and Second Circuits. *See Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S.Ct. 74 (1990); *Kaplan v. City of*

Burlington, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992). This explicit split in the Federal Circuit Courts of Appeals reflects profound disagreement on the fundamental issue presented in this case and results in inconsistent rulings for parties who are located in different jurisdictions throughout the country.

Finally, the position set forth in the decision below frames a question of exceptional public importance in the context of unattended religious displays erected by private groups in a public forum closely associated with the seat of government: "In a public forum, the religious context of private speech is absolutely irrelevant for First Amendment purposes." App. A12. If allowed to stand, the decision below would lead to the public forum doctrine always taking precedence over the Establishment Clause, which would create serious difficulties for state and local governments that in good faith attempt not to "appear[] to take a position on questions of religious belief." *County of Allegheny*, 492 U.S. at 594.

I. THE SIXTH CIRCUIT IN THIS CASE HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The court below has adopted a blanket holding that any privately sponsored religious display located in a public forum, even a public forum that is closely associated with the seat of government, simply cannot, under any conceivable circumstances, be regarded as government endorsement of religion. That holding addresses an important question of Federal law which has not been, but should be, settled by this Court.

In *Lynch*, the Court ruled that a city's display of a creche as part of a larger Christmas holiday display located in a park was permissible under the Establishment Clause. The Court was narrowly divided on the outcome of the case, however, ruling by a 5-4 margin. The Court found that the facts of *Lynch* presented an extremely close question under the Establishment Clause, despite the fact that the display was located in a park rather than at the seat of government. Crucial to the Court's decision was the fact that the creche was displayed along with a large variety of secular symbols that had the effect of "negat[ing] any message of endorsement" of "the Christian beliefs represented by the creche." 465 U.S. at 695 (O'Connor, J., concurring).

Although the park in *Lynch* was owned by a nonprofit organization, it was located in the heart of the city's shopping district. The Court considered the creche similar to those found on public grounds, 465 U.S. at 671, and has long considered parks to be quintessential "public fora." In *Hague v. CIO*, 307 U.S. 496, 515-16 (1939), for example, one of the first decisions to recognize the concept of the public forum, the Court expressly observed that parks in this country are universally considered to be public fora:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. [Such] privilege . . . must not, in the guise of regulation, be abridged or denied.

See also Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141, 2146 (1993) (parks and sidewalks are "traditional public fora"); *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J., concurring) ("types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks").

Shortly after *Lynch* was decided, the Court granted review in *McCreary* to consider and resolve the conflicting views expressed by the lower courts on the question of how the Establishment Clause would apply to the display of a solitary creche in a public forum. *See McCreary*, 53 U.S.L.W. 3273 (U.S. 1984) (granting certiorari to consider whether city "is compelled under rule of [*Widmar*] to allow placement of creche in park for approximately two weeks of Christmas season" and whether city would "violate Establishment Clause if it authorized placement of creche in park" under *Lynch*). The Court clearly understood that the distinct issue of unattended private religious displays erected in a public forum was not determined by its *Lynch* decision in the previous Term. The Court was unable to provide a definitive resolution of the issue, however, when it divided 4-4 and thus was obliged to affirm without issuing any clarifying opinion. *See McCreary*, 471 U.S. 83.

In *County of Allegheny*, the Court limited *Lynch*, again in a 5-4 ruling, by holding that the Establishment Clause does *not* permit the display of a creche as part of a holiday seasonal display that is located at the seat of county government, though not in a public forum. In *County of Allegheny*, significantly, the creche was not erected by the government, but was privately owned and sponsored. *See* 492 U.S. at 601 ("the fact that the creche bears a sign disclosing its ownership by a Roman Catholic organization does not alter this conclusion. . . . [T]he Establishment

Clause prohibits what occurred here: the government's lending its support to the communication of a religious organization's religious message."). It was displayed, moreover, in a location that had occasionally been permitted to be used for other displays, such as a display of flags commemorating the anniversary of Israel's independence, though again that particular location was not itself a public forum. *See id.* at 600 n.50.

In *County of Allegheny*, the Court posed the Establishment Clause inquiry as "whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." 492 U.S. at 592. At the very least, the Court held, the essential principle underlying the endorsement test "prohibits government from appearing to take a position on questions of religious belief." *Id.* at 593-94. The Court applied this analysis and distinguished *Lynch* by focusing on the effect of the religious symbol in its overall setting: "Under the Court's holding in *Lynch*, the effect of a creche display turns on its setting. Here, unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message." *Id.* at 598.

For purposes of this case, however, the most important fact about *County of Allegheny* is that it again expressly recognized and deferred resolution of the open question that remained from *McCreary*. As the Court observed: "the creche here does not raise the kind of 'public forum' issue . . . presented by the creche in *McCreary v. Stone*, [which was affirmed] by an equally divided Court." *County of Allegheny*, 492 U.S. at 600 n.50.

The court below essentially ignored *Lynch* and summarily dismissed the relevance of *County of Allegheny*. App. A10. Instead, the lower court relied on its previous *Americans United* ruling, which rested its analysis on an

inference that the so-called "equal access" cases, such as *Widmar*, *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), and *Lamb's Chapel*, have somehow *sub silentio* overruled or thrust aside many of the difficult and more fact-sensitive issues concerning unattended religious displays that this Court has grappled with in cases like *Lynch* and *County of Allegheny*. *See Americans United*, 980 F.2d at 1549 ("this case must be governed by [such cases as] *Widmar* and *Mergens*").

Any such inference, however, would be incorrect. In fact, the Court has appeared to treat the issues raised by unattended religious displays under the Establishment Clause and those raised by the "equal access" doctrine as essentially separate. The Court therefore has held that the latter doctrine applies to speakers who seek access for themselves to conduct meetings or similar events in facilities that have been opened for general use by the public, which is the precise understanding of this doctrine that Congress wrote into federal law in the Equal Access Act, 20 U.S.C. §§4071-4074, as upheld in *Mergens*.[4] At the same time, however, the Court in its "equal access" cases has treated its decisions concerning unattended holiday seasonal displays as distinct and inapposite without any detailed discussion. *See, e.g.*, *Mergens*, 496 U.S. at 249; *cf. County of Allegheny*, 492 U.S. at 600 n.50 (noting that the relationship between these two lines of doctrine has not yet been considered or resolved). The perceived gulf between these two doctrines apparently lies in the distinction between private speech and government speech. That distinction, though perhaps

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[4] The Act essentially makes it unlawful for any public secondary school which has a limited open forum to deny equal access or discriminate against "any students who wish to *conduct a meeting* within that limited open forum" on the basis of the religious or other content of their speech. 20 U.S.C. §4071(a) (emphasis added).

obvious enough in the context of particular visible speakers, lacks the same clarity when one considers an unattended display that does not itself articulate the nature of its connection to the government except by its contents and its location, especially when it is located at the very seat of government.

Finally, the court below downplayed the significance of two critical points in this case: the location of this religious display at the very seat of state government, and the nature of the religious symbol at issue in this case. On the location of the display, this Court in *County of Allegheny* explicitly distinguished its holding in *Lynch* on the grounds that the creche in *County of Allegheny* was located at the seat of county government in a prominent position. 492 U.S. at 599-600. The Court stated that no observer "could reasonably think that it occupies this location without the support and approval of the government." *Id.*; *see also id.* at 626 (O'Connor, J., concurring) (creche displayed at "the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community"); *id.* at 627 ("The Court correctly concludes that placement of the central religious symbol of the Christmas holiday season at the Allegheny County Courthouse has the unconstitutional effect of conveying a government endorsement of Christianity.").

Moreover, the unattended religious display here was of the Latin cross, a strictly religious, indeed sectarian, symbol. Unlike a creche, the Latin cross is not a traditional Christmas symbol, but instead is "the principal symbol of Christianity as practiced in this country today." *See, e.g., American Civil Liberties Union v. City of St. Charles*, 794

F.2d 265, 271-72 (7th Cir.) (Posner, J.) (enjoining holiday display of Latin cross on government building), *cert. denied,* 479 U.S. 961 (1986). In *County of Allegheny*, indeed, several members of this Court noted that the display of a Latin cross would raise distinct and troubling questions under the Establishment Clause. Justice Kennedy noted that the display of a large Latin cross on government property would certainly run afoul of the Establishment Clause, because it "would place the government's weight behind an obvious effort to proselytize on behalf of a particular religion." 492 U.S. at 661 (Kennedy, J., concurring and dissenting). Justice O'Connor noted her agreement and added that such a display would run afoul of the Establishment Clause even if it were erected only for a short time. *Id.* at 629-30 (O'Connor, J., concurring).

In addition, both Justices cited with approval such cases as *Friedman v. Board of County Comm'rs*, 781 F.2d 777 (10th Cir. 1985) (en banc) (display of Latin cross in one quadrant of county seal violates Establishment Clause), *cert. denied*, 476 U.S. 1169 (1986). *See County of Allegheny,* 492 U.S. at 629 (O'Connor, J., concurring); *id.* at 661 (Kennedy, J., concurring and dissenting). Justice Kennedy also cited with approval two other cases invalidating displays of the Latin cross in public parks. *See id.* In short, as the Seventh Circuit has summarized, "we are masters of the obvious, and know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross." *Gonzales v. North Township*, 4 F.3d 1412 (7th Cir. 1993).

Contrary to the Sixth Circuit's analysis, then, this Court has clearly *not* settled, either expressly or implicitly, the issue of whether any conceivable private religious display in a public forum, regardless of its contents or its location, must be judged valid under the Establishment Clause. Instead, this case cleanly presents a straightforward

opportunity to consider and resolve that longstanding constitutional question.

II. THE SIXTH CIRCUIT'S DECISION CONFIRMS AND REINFORCES A DEEP AND PERSISTENT CONFLICT AMONG THE FEDERAL COURTS OF APPEALS ON THE ISSUE OF WHETHER PRIVATE RELIGIOUS DISPLAYS IN A PUBLIC FORUM CLOSELY ASSOCIATED WITH THE SEAT OF GOVERNMENT CAN EVER VIOLATE THE ESTABLISHMENT CLAUSE.

The decision below follows directly upon the Sixth Circuit's previous *en banc* decision in *Americans United*. As the Sixth Circuit stated, broadly and clearly, in this case: "We have held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." App. A8 (citing *Americans United*, 980 F.2d at 1553). The court applied that general rule in this case despite the fact that the public forum here is closely associated with the seat of government. The Sixth Circuit's position, which was originally adopted in *Americans United* and emphatically followed in the decision below, is in direct conflict with the Fourth and Second Circuits, as the Sixth Circuit has explicitly acknowledged. Indeed, in *Americans United*, the Sixth Circuit has expressly "decline[d] the invitation to follow several cases cited by the plaintiffs." 980 F.2d at 1550-51 (discussing *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990), and *Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990)).

In *Smith*, the Fourth Circuit held that a creche erected by the Jaycees in a public forum -- there, the front lawn of

a county office building -- during the holiday season violated the Establishment Clause. The court quoted approvingly the way that the District Court distinguished the "equal access" doctrine from the analysis of unattended religious displays that is required under the Establishment Clause:

> In *Widmar*, the Supreme Court found that no *imprimatur* of state approval would be transmitted through an open access policy in that case. But here, because of the nature, size, location, and duration of the display, and its relation to the symbolic center of government, the appearance of a government *imprimatur* upon a certain religious ideology is present.

895 F.2d at 959 n.6 (quoting *Smith v. Lindstrom*, 699 F. Supp. 549, 565 (W.D. Va. 1988) (emphasis in original)). The court concluded that "the display unmistakably conveyed an 'endorsement' . . . therefore justifying some restriction on an otherwise available public forum." 895 F.2d at 959.

In *Americans United*, the Sixth Circuit initially tried to distinguish *Smith*, but then said more candidly that "even if *Smith* were exactly on point with this case, we believe that the *Smith* court simply erred by minimizing the importance of an equal access policy. We choose to avoid that error, rather than repeat it." 980 F.2d at 1551.

Similarly, in *Kaplan*, the Second Circuit found that a private group's unattended, solitary display of a large menorah in the public forum of City Hall Park, located directly in front of the seat of the Burlington city government, violated the Establishment Clause. The Court rejected the very argument adopted by the court below -- "that the [appellees] have an absolute constitutional right to

engage in symbolic expressive conduct in a public forum such as City Hall Park" -- because otherwise "the public forum doctrine would swallow up the Establishment Clause." 891 F.2d at 1029.[5] Again, the Second Circuit distinguished the "equal access" doctrine of *Widmar*, noting that "here, unlike in *Widmar*, the City's equal-access policy is incompatible with the Establishment Clause." *Id.* at 1030.[6]

In a more recent decision, the Second Circuit has reaffirmed its adherence to *Kaplan*, again in a case involving a private organization's attempt to display an unattended menorah directly in front of the Burlington City Hall. *See Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109

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[5] Significantly, the Second Circuit in *Kaplan* recognized that the location of a public forum at the very seat of government sharpened the issue it had considered in *McCreary*, thus leading to its square disagreement with the position taken by the Sixth Circuit in this case:

> The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement. *See Widmar*, 454 U.S. at 273-75. Here, unlike in *McCreary*, the park involved is not any city park, but rather City Hall Park. This Park is bounded on the east by City Hall, the seat and the official symbol of Burlington city government. . . . In light of these facts, "[n]o viewer could reasonably think that [the display] occupies this location without the support and approval of the government." *Allegheny*, 109 S. Ct. at 3104.

Kaplan, 891 F.2d at 1029-30.

[6] The court also noted that based on appellees' argument, which it rejected, "it would also seem permissible to display, standing alone, a symbol of the majority faith -- a creche or a cross -- and this could well lead members of minority religions or nonbelievers to think that 'adherence to a religion' was relevant to 'standing in the political community.'" 891 F.2d at 1030 (quoting *County of Allegheny*, 492 U.S. at 625 (O'Connor, J., concurring)).

(2d Cir. 1991) (court rejected private organization's proposal to move the menorah further away from City Hall and place it near two signs that sent a secular holiday message), *cert. denied*, 112 S. Ct. 3026 (1992). The court again took the opportunity to explain that it found the "equal access" cases wholly inapposite, noting that the Supreme Court's intervening decision in *Mergens* "is factually distinguishable from this case for the same reason that its predecessor, [*Widmar*,] was distinguishable from *Kaplan*: it involved an open forum, with live speakers, in a public university." 936 F.2d at 112.

In *Americans United*, the Sixth Circuit also expressly disagreed with the Second Circuit, noting that "this court has criticized *Kaplan* heavily on several occasions," and identifying three such prior decisions in which the Sixth Circuit had sided instead with the dissenting judge in *Kaplan*. 980 F.2d at 1551. In the end, the Sixth Circuit curtly stated its disagreement with the Second Circuit on the issue of unattended religious displays erected by private groups in a public forum: "in light of the above discussion of *Widmar* and *Mergens*, it is clear that *Kaplan* simply misconstrues the endorsement test." *Id.*

In doing so, the Sixth Circuit aligned itself with the Seventh Circuit's decision in *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc), which upheld a display of religious paintings in a public park against a challenge framed under the Establishment Clause. *See Americans United*, 980 F.2d at 1551. In fact, however, the decision below represents a substantial extension of *Small*. In *Small*, the Seventh Circuit reversed the trial court's "finding that the religious content of a display in a quintessential public forum *far removed from the seat of government* violates the Establishment Clause, for public forums must be open to religious speech." *Small*, 964 F.2d at 619 (emphasis

added). Indeed, despite the earlier holding in *Small*, a panel of the Seventh Circuit has since enjoined a privately sponsored but publicly maintained crucifix that had stood in a public park for more than forty years as a violation of the Establishment Clause. *See Gonzales v. North Township,* 4 F.3d 1412 (7th Cir. 1993). The court held that the cross "does not bear secular trappings sufficient to neutralize its religious message," and indeed because it "does not convey any secular message, whether remote, indirect, or incidental," its "presence in the Park conveys the primary message of the Township's endorsement of Christianity." *Id.* at 1422-23.

Since *Americans United*, the Eleventh Circuit has adopted the same position as the Sixth Circuit, citing with approval both *Americans United* and the Seventh Circuit's decision in *Small*. The case, *Chabad-Lubavitch of Georgia v. Miller,* 5 F.3d 1383 (11th Cir. 1993), poses a direct conflict with *Kaplan* and *Smith*, as does the case at hand. In *Miller*, the court held that the state would not violate the Establishment Clause by allowing a private group "to display its privately owned menorah in the [Capitol] Rotunda, a public forum located in a core government building" under an equal-access policy. *Id.* at 1388. The Eleventh Circuit echoed the Sixth Circuit in directly criticizing the *Kaplan* and *Smith* decisions, brushing them aside as having "simply misunderstood the principles they sought to apply." *Id.* at 1394 n.17. Both *Miller* and the decision below thus confirm a direct conflict between the Sixth and Eleventh Circuits, on the one side, and the Second and Fourth Circuits, on the other side, on the issue of whether private religious displays located in a public forum closely associated with the seat of government can ever violate the Establishment Clause.

In addition, the Ninth Circuit has plainly recognized the same circuit split in *Kreisner v. City of San Diego*, 1

F.3d 775 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994). There the court noted all the same points made at more length above. First, the question of "whether placement of a private, overtly religious holiday display on public property represents government endorsement of religion" is one that the Supreme Court "has not yet squarely addressed." *Id.* at 782. "It has divided the circuits.... Even within individual circuits, the answer has not always been consistent. . . . Indeed, . . . virtually every panel to consider this issue has found itself divided." *Id.* at 783 (citing cases).[7]

Thus, it is clear that even after the Court's decision in *County of Allegheny*, and even after the Court's distinct ruling in *Mergens*, a sharp and persistent split concededly exists among the Federal Circuit Courts of Appeals on the sole issue presented in this case: whether an unattended religious display erected by a private group in a public forum closely associated with the seat of government can ever violate the Establishment Clause.

The Court therefore should grant certiorari in this case to resolve this central issue. Many Americans believe that "displays of this kind inevitably have a greater tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal." *County of Allegheny*, 492 U.S. at 651 (Stevens, J., concurring and dissenting). The extreme position adopted by the court

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[7] Although the Ninth Circuit thus acknowledged the issue presented in this case, its *Kreisner* decision cannot truly be regarded as adding to the specific circuit conflict identified here, as the court recognized, for the religious display at issue in *Kreisner* was located in a park that the court acknowledged was not "closely associated with the seat of government." 1 F.3d at 786 & n.7 (distinguishing *Kaplan* and *Smith* on this basis). The same point cannot be made about the case at hand.

below encourages increasing divisiveness and alienation in our society by undercutting the thrust of the Establishment Clause, which is designed to prevent public bodies from fomenting just such differences between members of society. *Id.* The decision below forces the state to violate the Establishment Clause by, in effect, "requir[ing] the Establishment Clause always to yield to the Free Speech Clause when the two are in conflict." *Americans United*, 980 F.2d at 1555 (Lively, J., dissenting). As this Court has recognized, however, Petitioners have a "compelling" state interest in avoiding any such violation of the Establishment Clause, which must override any free speech claims otherwise raised by Respondents. *See Widmar*, 454 U.S. at 271; *Lamb's Chapel*, 113 S.Ct. at 2148; *see also Lee v. Weisman*, 112 S. Ct. 2649, 2657-58 (1992) ("the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions").

It is most assuredly an intolerable state of affairs when such distinct and opposing positions represent the prevailing law of the land in different parts of this country. The effect of this situation is that persons who reside in different jurisdictions must shape their lives according to entirely incompatible applications of the First Amendment to the United States Constitution. The constitutionality of governmental efforts to appear neutral in religious matters and instill a feeling of equality in American citizens of minority faiths should be resolved by this Court, not solely for the benefit of the parties here, but for the benefit of the state, county, and local governments, and all of their citizens, who require guidance from this Court on the fundamental constitutional issue presented in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 24, 1994

No. 93-4367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT J. PINETTE; DONNIE A. CARR; KNIGHTS OF THE KU KLUX KLAN,	:	
Plaintiffs-Appellees,	:	**ON APPEAL from the United States District Court for the Southern District of Ohio**
CAPITOL SQUARE REVIEW AND ADVISORY BOARD; RONALD T. KELLER; DANIEL SHELLENBARGER; RICHARD H. FINAN,	:	
Defendants-Appellants.	:	

Decided and Filed July 25, 1994

Before: JONES and RYAN, Circuit Judges; and KRUPANSKY, Senior Circuit Judge.

RYAN, Circuit Judge. Does a private organization's display of a religious symbol in a public forum violate the

Establishment Clause? We answered "No" in *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993)(*en banc*), provided that there is equal access to the public forum and the display itself is truly private. Yet some doubt lingers, at least in the mind of the defendants in this case, as to when private religious speech violates the Establishment Clause.

The Capitol Square Review and Advisory Board appeals the district court's injunction ordering the board to grant Vincent J. Pinette and the Knights of the Ku Klux Klan, Ohio Realm, a permit to erect a wooden cross in Capitol Square, a public square in front of the state capitol building in Columbus, Ohio. Because Capitol Square is a public forum and the Klan's display of a Latin cross is private speech, a reasonable observer could not perceive the display at issue to be a government endorsement of religion. Therefore, we hold that the display does not violate the Establishment Clause and we affirm.

I.

Capitol Square is a ten-acre public square located in downtown Columbus, Ohio, and is owned by the State of Ohio. Ohio's state capitol building, the Statehouse, is located in Capitol Square along with other governmental office buildings. For more than a century, countless public gatherings and cultural festivals have been held in the square. During the holiday season, the square has been decorated with lights, a Christmas tree, and, in recent years, a menorah. The Capitol Square Review and Advisory Board, by virtue of Ohio. Rev. Code Ann. §123.02.2, has the sole authority to regulate the various uses of the square.

On November 18, 1993, the board voted to ban unattended displays from the square during December 1993.

The board, however, reversed its decision within a week following public outcry. A Christmas tree went up, and on November 29, 1993, the board granted a permit to erect a menorah on the square during the eight days of Chanukah. On that same day, November 29, Donnie A. Carr, the Columbus unit coordinator for the Ku Klux Klan, Ohio Realm, applied for a permit to erect a cross on the square from December 8 through December 24, 1993. On December 3, Ronald Keller, the executive director of the board, denied the Klan's application for a permit, stating in a letter that his decision "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." On December 9, the Klan appealed Keller's decision; an administrative hearing was held and the hearing officer issued a report and recommendation advising that the Klan's application for a permit be denied. The board subsequently adopted that recommendation. On December 17, the Klan, through Vincent Pinette, its chief executive officer, Ohio Realm, sought an injunction in federal district court requiring the board to issue the permit. The district court held a hearing on December 20, and on December 21, the district court granted the Klan's request for an injunction and ordered the board to issue the permit. The district court concluded that Capitol Square was a traditional public forum and the cross the Klan proposed to erect was protected speech. The district court reasoned that because a private party (not the government) sought to display a religious symbol in a public forum, a reasonable observer would not perceive the display to be an endorsement of religion and thus the Establishment Clause was not implicated.

After the district court issued the injunction, the board immediately moved for a stay pending appeal, which the district court denied. On December 21, the board appealed

to this court and moved for an emergency stay pending the appeal, which we denied on December 22, 1993. The board then filed an emergency application for a stay of injunction with Supreme Court Associate Justice John Paul Stevens, our circuit justice, which he denied on December 23, 1993. 114 S.Ct. 626 (Stevens, Circuit Justice 1993). Meanwhile, the Klan erected the cross on Capitol Square on the evening of December 21; the cross remained there for at least a day until it was vandalized.

II.

Our jurisdiction, of course, depends upon the existence of an actual case or controversy. *SEC v. Medical Comm. for Human Rights*, 404 U.S. 403, 406 (1972); *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *see also* U.S. Const. art. III, §2. At the outset, we acknowledge that events subsequent to our hearing oral argument in this appeal have rendered this case moot: the injunction at issue has already expired and the cross no longer stands in Capitol Square. *Cf. Neighbors Organized to Insure a Sound Env't, Inc. v. McArtor*, 878 F.2d 174, 178 (6th Cir. 1989). However, in a case in which an injury is inherently of such short duration as to make judicial review largely impossible, and the injury is likely to recur, we do not dismiss the case for mootness. *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). We think it likely that the Klan or some other organization will, in the future, seek access to Capitol Square, and there is every reason to believe that any future action involving the same parties and issues will take at least as long to wind its way through the legal system as this case has. *See Rosen v. Brown*, 970 F.2d 169, 173 (6th Cir. 1992). Thus, we are satisfied that we may properly exercise jurisdiction over this case under the exception to the mootness doctrine for wrongs capable of repetition yet evading review.

Ordinarily we review a district court's grant or denial of an injunction for an abuse of discretion, *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992), but here the district court combined the hearing on the injunction with a trial on the merits under Fed. R. Civ. P. 65(a)(2). Accordingly, we review the district court's findings of fact for clear error under Fed. R. Civ. P. 52 and its conclusions of law *de novo*.

The United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . . " U.S. Const. amend. I. The Religion Clauses of the First Amendment apply to the states via the Fourteenth Amendment. *Cruz v. Beto*, 405 U.S. 319, 322 (1972); *Everson v. Board of Educ.*, 330 U.S. 1, 5 (1947). Private religious speech is protected under the Free Speech and Free Exercise Clauses. *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Without a compelling interest, the government may not discriminate against private speech in a public forum on account of the speaker's views. *See, e.g., Carey v. Brown*, 447 U.S. 455, 461-62 (1980); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951). Speakers with a religious message are entitled no less access to public forums than that afforded speakers whose message is secular or otherwise nonreligious. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993); *Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 248-49 (1990); *Widmar v. Vincent*, 454 U.S. 263, 267 n.5, 274-75 (1981); *Niemotko*, 340 U.S. at 271-72; *Americans United*, 980 F.2d at 1553; *Doe v. Small*, 964 F.2d 611, 629 (7th Cir. 1992)(Easterbrook, J., concurring). Finally, we must keep in mind that "there is a crucial difference between *government* speech endorsing religion, which the

Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250.

Capitol Square is, indeed, a traditional public forum. Over the years, groups as divergent as the Ku Klux Klan and the United Way have held rallies and sponsored speeches in the square. During the holiday season, a menorah and a Christmas tree have been displayed on the square.

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey*[, 447 U.S. at 461].

Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)(parallel citations omitted). As the Supreme Court observed in *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 112 S. Ct. 2701, 2705 (1992), "regulation of speech on government property that has

traditionally been available for public expression is subject to the highest scrutiny." The Klan is entitled to the full protection of the public forum doctrine, even though it seeks to erect a cross rather than sponsor a speech. The Constitution protects any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. Washington*, 418 U.S. 405, 409 (1974)(*per curiam*).

The district court held that the Klan's plan to erect a cross in the square did not violate the Establishment Clause because a reasonable observer would not construe the display, sponsored by a private party and accompanied by a sign disclaiming governmental sponsorship, as an endorsement of religion. The defendants argue that the district court erred because (1) a cross is a powerfully religious symbol that cannot be "sanitized" through the ameliorating secular gloss associated with the Christmas holiday; and (2) the location of this distinctly religious display in front of the Ohio Statehouse and on Capitol Square would lead a reasonable observer to conclude that the State of Ohio endorsed Christianity. Until today, we had not thought that there would be any circumstances under which it could seriously be argued that the United States Constitution requires that religious speech be "sanitized."

For a government display of a religious symbol to pass constitutional muster, the display must: 1) have a secular purpose; 2) neither advance nor inhibit religion in its principal or primary effect; and 3) "not foster 'an excessive entanglement with religion.'" *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)(quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970)). The *Lemon* test has subsequently been refined to ask whether a reasonable observer would view the disputed display as a government endorsement of religion. *See Lynch v. Donnelly*, 465 U.S. 668, 687-94

(1984)(O'Connor, J., concurring); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). Of course, the display at issue here is not a government sponsored display; it is, in fact, privately funded and privately maintained, and carries an express disclaimer of any government support.

We have held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause. *Americans United*, 980 F.2d at 1553. In *Americans United*, we considered the constitutionality of a menorah displayed in a public square in Grand Rapids, Michigan. We acknowledged in that case that several aspects of the display arguably intimated government endorsement of religion: the display was undoubtedly religious; it stood in close proximity to official governmental buildings; and the display did not contain secular symbols. But we held that:

> [T]wo crucial facts make this case very different from many holiday display cases: [the] display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access. Although these facts are not automatically determinative, recent precedent indicates that they should carry much more weight than the details of the display emphasized by the plaintiffs.

Id. at 1545.

To silence a speaker in a public forum, the state must have a compelling interest, *Perry*, 460 U.S. at 45; defendants claim the compelling interest here is not violating the Establishment Clause. A reasonable observer, defendants argue, would conclude that Ohio endorsed Christianity after

viewing a cross standing in front of the Statehouse in Capitol Square. The defendants concede that the Klan's cross is private speech but they fear that some uninformed observer will come upon Capitol Square, and, on seeing the cross in front of the Statehouse, will draw the opposite conclusion--despite the fact that the cross carries a disclaimer of any government support.

The freedoms guaranteed by the Constitution cannot depend upon the fanciful perceptions of some hypothetical dolt. The obvious analogy is to the problem of the "Heckler's Veto" so eloquently discussed by Professor Kalven. Harry Kalven Jr., *The Negro and the First Amendment* 140-60 (1965). As we observed in *Americans United*:

> We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine.

980 F.2d at 1553. Similarly, Judge Easterbrook has written: "If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum." *Small*, 964 F.2d at 630 (Easterbrook, J., concurring). In short, the Establishment Clause forbids only religious speech sponsored by the government, so "truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer." *Americans United*, 980 F.2d at 1553.

Defendants argue that this is one of those rare cases, analogous to *County of Allegheny*, 492 U.S. 573, where private religious speech can violate the Establishment Clause. In *County of Allegheny*, however, the religious display--a privately sponsored holiday creche--was placed on a ceremonial staircase inside the Allegheny County Courthouse. In enjoining the display, the Court noted that the "Grand Staircase" was not the "kind of location in which all were free to place their displays for weeks at a time." *Id.* at 600 n.50. Clearly, the staircase was not a public forum. By allowing the display to be placed in a privileged location, the county endorsed it. In contrast, Capitol Square in Columbus is open to anyone, and there is no indication that Ohio treated the Klan or its display favorably.

Defendants also rely on three cases from the Seventh Circuit for the proposition that private religious speech can violate the Establishment Clause. In *ACLU v. St. Charles*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986), the Seventh Circuit enjoined the display of a lighted cross on a public building, a firehouse. The case is easily distinguished: the side of a public building, like a ceremonial staircase in a county courthouse, is not a public forum. By affording the religious speaker such an exclusive location from which to announce his message, the government "endorsed" or impermissibly supported a particular religious message. In *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993), the Seventh Circuit enjoined a permanent display of a crucifix in a public park. In that case, however, the crucifix was part of a war memorial that was donated to the township by the Knights of Columbus, *Id.* at 1421, so the display in effect became governmental religious speech. Finally, defendants point to language in *Small*, 964 F.2d at 619:

> Moreover, the mere presence of religious

> symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government.

Defendants make much of the "far removed from the seat of government" language--indeed, too much. The undisputed holding of *Small* is that private religious speech in a public forum does not violate the Establishment Clause. *Id.* The fact that the park which was home to the disputed display in *Small* was "far removed from the seat of government" was little more than a gratuitous observation offered to bolster the court's conclusion that the park was, in fact, a true public forum unlike the ceremonial staircase in *County of Allegheny* and the side of the firehouse in *St. Charles*.

Religious groups may not be selectively denied access to public forums in the name of the Establishment Clause; the Free Speech and Free Exercise Clauses prohibit this. *Lamb's Chapel*, 113 S. Ct. at 2147-48; *Mergens*, 496 U.S. at 248-49; *Widmar*, 454 U.S. at 274-75. The potency of religious speech is not a constitutional infirmity; the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum. Zealots have First Amendment rights too. Some speech may be distasteful, unpopular, and outright offensive, but as Justice Thurgood Marshall so persuasively wrote, the protection found in the First Amendment does not depend upon popular opinion:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to

> express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on this basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Mosley, 408 U.S. at 96 (footnote omitted). The constitutional command of governmental neutrality and even-handedness in regulating the public forum is no less binding in the case of private religious speech. In a public forum, the religious content of private speech is absolutely irrelevant for First Amendment purposes.

III.

Accordingly, we **AFFIRM**.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,

Plaintiffs,

vs. Case No. C2-93-1162

JUDGE GRAHAM

Capitol Square Review and
Advisory Board, et al.,

Defendants.

OPINION AND ORDER

This matter is before the Court upon a motion for a temporary restraining order and preliminary injunction filed by plaintiffs and upon a hearing held thereon on December 20, 1993. At the outset of the hearing, the Court announced that it would consolidate the hearing on the motion for preliminary injunction with a trial on the merits of Count One of the Amended Complaint pursuant to Fed. R. Civ. P. 65(a)(2).

FINDINGS OF FACT

1. Plaintiffs seek a permit to "Erect A Cross For Christmas" on the Capitol Square in Columbus, Ohio for the remainder of the time between December 8, 1993 and December 24, 1993.

2. Plaintiffs are the Knights of the Ku Klux Klan (Ohio Realm) (hereinafter "the Klan"), its chief executive officer, Vincent J. Pinette, and its Unit Coordinator for Columbus, Ohio, Donnie A. Carr. The Klan is an unincorporated association whose members reside in the State of Ohio.

3. Defendants are the Capitol Square Review and Advisory Board (hereinafter "the Board"), a state board chartered under Ohio Revised Code §123.022, its executive director, Ronald T. Keller, its spokesperson, Daniel Shellenbarger, and its chairperson, State Senator Richard H. Finan.

4. The Capitol Square, which is defined by law in §123.022(I) of the Ohio Revised Code, comprises an entire city block in downtown Columbus, Ohio, located south of Broad Street, north of State Street, east of High Street and west of Third Street. The Capitol Square is owned by the State of Ohio. It is the site of the Ohio state capitol building.

5. For many years, the Capitol Square grounds have been made available for speeches and public gatherings by various groups advocating various causes both secular and religious. For the past several years, displays have been placed upon the Capitol Square for limited periods during the month of December. These have included a Christmas tree and a free-standing Hanukkah menorah, which is a nine-branch candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah.

6. On November 18, 1993, the Capitol Square Review and Advisory Board, which regulates the use of the Capitol Square, voted not to permit displays on the Capitol Square during December, 1993. The vote was later declared

invalid and, on November 23, 1993, the Board voted to approve displays of a Christmas tree and a menorah.

7. On November 29, 1993, Rabbi Capland applied for permission to erect a menorah on the Capitol Square from December 8-16, 1993. The application described the type of event as a "seasonal display." The application was granted the same day by defendant Keller.

8. On November 29, 1993, plaintiff Carr applied on behalf of the Klan for a permit to display a cross on the Capitol Square from December 8-24, 1993. The application described the type of event as to "erect a cross for Christmas."

9. Executive Director Keller denied the permit four days later, on December 3, 1993. Keller stated in the letter denying the request that the decision to deny the permit "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently rendered by the United States Supreme Court under the First Amendment to the United States Constitution."

10. On December 9, 1993, the plaintiffs appealed this decision to the Board.

11. The same day, in a separate letter to counsel for the Board, plaintiffs' counsel indicated that the cross "would be approximately 10 feet high, 6 feet across, made from 2 x 6 lumber, painted white, secured upright by free-standing tripod, and accompanied by a sign, readable from a distance, "'this cross was erected by private individuals without government support for the purpose of expressing

respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property.'" Plaintiffs' counsel further stated in this letter that "some matters, such as the contents of the sign, are open to negotiation."

12. A state administrative appeal on this matter was conducted by a hearing officer on December 17, 1993, at 3:00 p.m. The hearing was concluded shortly after 5:00 p.m. on December 17th. The hearing officer issued his report and recommendation on December 21, 1993, finding that the Board's earlier denial of the permit was proper. The Board adopted his report and recommendation on December 21, 1993. On December 21, 1993 the Court was provided with a copy of the hearing officer's report and recommendation and entertained additional arguments of counsel on the effect of the Board's adoption of that report on the issues before this Court. The Court found, for the reasons stated on the record of the December 21, 1993 proceedings, that plaintiffs alleged failure to post a bond was not a proper ground for the denial of the permit and that that issue was not properly before this Court.

13. A Christmas tree has been displayed upon the Capitol Square from December 7, 1993 to the present and remains on display. A menorah was displayed upon the Capitol Square from December 8-16, 1993. On other occasions organizations have been permitted to erect free-standing displays on the Capitol Square for a limited period of time. Examples include the United Way Campaign "thermometer" and craftsmen's booths and displays erected during an Arts Festival. There is no policy against such displays.

14. Defendants do not contend that the erection of a cross poses a security risk of any kind.

CONCLUSIONS OF LAW

The defendants initially argued that the doctrines of finality and abstention precluded this Court from addressing plaintiffs' claims at this time. Those issues were resolved when the Board adopted the report and recommendation of the hearing officer. Thus, the sole issue now before this Court is whether plaintiffs are entitled under the First or Fourteenth Amendment to erect a Latin cross on the Capitol Square or whether this conduct would violate the Establishment Clause.

In order to prevail, plaintiffs must establish the following:

1) defendants' actions in refusing to issue the permit contravene plaintiffs' rights under the Constitution of the United States;

2) the plaintiffs will suffer irreparable injury absent injunctive relief;

3) the plaintiffs have no adequate remedy at law.

Dayton Christian Schools, Inc. v. Ohio Civil Rights Comm'n, 766 F.2d 932, 961 (6th Cir. 1985), rev'd on other grounds, 477 U.S. 619 (1986); Buckhorn, Inc. v. Ropak Corp., 656 F.Supp. 209, 226 (S.D. Ohio 1987).

Assuming that the plaintiffs are entitled to erect such a display, they will suffer irreparable injury for which they have no adequate legal remedy if the defendants are not enjoined from denying them a permit. There is no other way for the plaintiffs to effectively vindicate their constitutional rights. Accordingly, plaintiffs' entitlement to the requested relief turns on the merits of their claim.

At the outset, the Court must determine whether the Capitol Square is a traditional public forum. The Supreme Court has defined three types of fora: "the traditional public forum, the public forum created by government designation, and the nonpublic forum." Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985). Traditional public fora are "those places which by long tradition or by government fiat have been devoted to assembly and debate." Id.

The evidence before this Court clearly establishes that the Capitol Square has been held open and used as a public forum for a considerable number of years. The Statehouse grounds have been made available for speeches or displays by gay, lesbian and bisexual groups, United Way of Franklin County, the Knights of the Ku Klux Klan, and commercial entities including participants in the Central Ohio Art Festival. During the December holiday season, the Capitol Square has also been used to display a menorah erected by a private organization. Thus, the Court finds that the Capitol Square is a traditional public forum.

The Capitol Square's status as a traditional public forum affords the plaintiffs significant constitutional protection. The First Amendment Free Speech Clause prohibits content-based regulation of the use of public fora. In Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 46 (1983), the Supreme Court held that no government may exclude speech from a traditional public forum unless "it's regulation is necessary to serve a compelling state interest and . . . is narrowly drawn to achieve that end." See also Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1541 (6th Cir. 1992) (en banc).

Religious expression enjoys the same First

Amendment protection as do other types of protected expression. Widmar v. Vincent, 454 U.S. 263 (1981); Heffron v. International Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981); Grand Rapids, 980 F.2d at 1542. Moreover, these protections extend beyond pure speech to any conduct that may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." Spence v. Washington, 418 U.S. 405, 409 (1974). See also Grand Rapids, 980 F.2d at 1542. Thus, the Court must be particularly cautious about abridging an individual's right to freedom of speech based upon the religious content of the message. Grand Rapids, 980 F.2d at 1542.

Defendants, however, raise a countervailing constitutional concern. Defendants contend that the State of Ohio violates the Establishment Clause by permitting a private organization to erect a large, unattended Latin cross upon the Capitol Square during the observance of the Christmas holiday. Defendants contend that while the Capitol Square might be a public forum subject to the First Amendment protections outline above, its status as the seat of state government renders the display of a Latin cross an establishment of religion in violation of the First Amendment.

Based upon the Sixth Circuit's recent interpretation and application of County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573 (1989) in Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992), this Court finds that plaintiffs' display does not constitute a government endorsement of religion, notwithstanding the fact that the Ohio state house is also located on the Capitol Square. In Grand Rapids, the Sixth Circuit considered whether a city's permitting a religious organization to place a private menorah displayed

in a traditional public forum during Hanukkah violated the Establishment Clause. Id. at 1542-43. The religious organization, Chabad House, had placed a 20-foot high menorah in Calder Plaza, the principle public plaza in downtown Grand Rapids. Id. at 1539-40. The plaza was surrounded by private office and government buildings including the Kent County Building, Grand Rapids City Hall, and the Federal Building. The county Hall of Justice, the city police station and the State of Michigan Office Building were also on opposing sides of the streets adjacent to the plaza. Id. at 1540. The menorah was accompanied by two signs measuring two feet by three feet which were illuminated at night. The signs read as follows:

> Happy Chanukah to All
>
> This Menorah display has been erected by Chabad House, a private organization. Its presence does not constitute an endorsement by the City of Grand Rapids of the organization or the display.

The menorah was paid for, erected, maintained and stored by the private organization. Id. at 1539.

Seeking to determine whether the City was violating the Establishment Clause by permitting the menorah display, the Sixth Circuit applied the three-part test of Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971):

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."

The appellate court found that the first and third prongs of the test were easily satisfied. Id. at 1543. A policy of permitting religious speech the same access as other types of speech serves a secular purpose. Id. This general access policy also avoids entangling government with religion, since no government official need decide which groups use the plaza. Id.

Turning to the second element of the Lemon test, the Sixth Circuit recognized that in County of Allegheny the Supreme Court had adopted a test first proposed by Justice O'Connor in Lynch v. Donnelly, 465 U.S. 668, 688 (1984):

> Since Lynch, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether "the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices."

Grand Rapids, 980 F.2d at 1543 (quoting County of Allegheny, 492 U.S. at 597 (Opinion of Blackmun, J.) (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985))). Accordingly, the Sixth Circuit framed the test as "whether the reasonable observer would conclude that Grand Rapids endorses religion by allowing Chabad House's display." Grand Rapids, 980 F.2d at 1544 (emphasis in original). Ultimately, the court concluded that the reasonable observer familiar with the many uses of the plaza would not interpret the menorah's presence as an endorsement of religion by the government. Id. at 1545. "[A] reasonable observer recognizes the distinction between speech the government supports and speech that it allows." Id.

(emphasis in original).

The plaintiffs in Grand Rapids identified several aspects of the menorah display which tended to suggest that the city was endorsing a religion: the display sent a religious message; it stood near the heart of local government; and it did not include secular symbols. Id. at 1544. Although the court agreed that these factors tended to support the claim that the display violated the Establishment Clause, the appellate court reasoned that "two crucial facts make this case very different from many holiday display cases: Chabad House's display is privately sponsored, and it stands in a traditional public forum to which all citizens have equal access." Id. at 1545. While these facts were not automatically determinative, the court stated that recent precedent indicated that "they should carry much more weight than the details of the display emphasized by the plaintiffs." Id.

The appellate court found it extremely significant that this speech was private in nature. The court noted that County of Allegheny involved a situation where the county gave a special preference to the group displaying the creche on the grand staircase, associated itself with the creche in county press releases and visually linked the county with the creche by placing next to official county signs two small evergreens identical to those in the creche display. Id. By doing so, the county effectively associated itself with that particular religious message. Id. No comparable connection between government and religion could be drawn from the menorah's presence on the plaza. According to the court, "the display at issue is purely private, with neither overt nor covert government support, and this fact weighs heavily against a finding of endorsement." Id. at 1546.

The appellate court found that the presence of

disclaimer signs further evidenced the private nature of this speech. "[T]he signs make the private ownership of the menorah obvious to anyone who cares to investigate the possibility of government endorsement." Id. These disclaimers were thus found to be another factor weighing in favor of allowing the display.

As important as private sponsorship was the fact that the city had traditionally provided all parties equal access to Calder Plaza. Id. The Sixth Circuit noted that the Supreme Court had repeatedly held that where an equal access policy exists, religious speech must be afforded the same privileges as nonreligious speech, the Establishment Clause notwithstanding. Id. at 1546-48.

The court also rejected plaintiffs' argument that the menorah display violated the Establishment Clause because it stood alone. Id. at 1549. The court explained that the symbol was in itself speech and did not have to be accompanied by adherents in order to be afforded the full panoply of protections. Id. Finally, the court observed that any tendency the menorah standing alone might have toward suggesting state endorsement of that religious view was "simply overwhelmed by Calder Plaza's status as a traditional public forum." Id. As the court explained:

> To a reasonable observer, no display actually stands alone in this public forum. In the mind's eye, the reasonable observer sees the menorah display as but one of a long series that has taken place since the Plaza was opened. The reasonable observer knows that other speakers have used the Plaza before, and will do so again. Instead of concluding that religious zealots have stormed the gates with the city's endorsement, the reasonable

> observer recognizes this display as yet another example of free speech.

Id.

Applying the Sixth Circuit's reasoning in Grand Rapids to the facts and issues presented in the instant case leaves little doubt that the plaintiffs must be permitted to erect a cross on the Capitol Square. The instant request comes from a private party to erect a religious symbol in what is a traditional public forum. In light of these facts, it is difficult to conclude that permitting this display would constitute government endorsement of religion. The Grand Rapids court plainly stated that the two most important factors in holiday display cases are the identity of the sponsor and the nature of the forum. Id. at 1553. ("Thus, we rule in favor of Grand Rapids and Chabad House, because we hold that truly private religious expression in a truly public forum cannot be seen as endorsement by a reasonable observer.")

Notwithstanding these considerations, the defendants -- relying on County of Allegheny and its progeny -- contend that this religious display at the seat of government will give rise to an Establishment Clause violation. Yet, County of Allegheny involved very obvious efforts by the government to associate itself with a particular religious display. By contrast, the State of Ohio is in no way associating itself with the plaintiffs' display. Indeed the "reasonable" observer -- being an individual who is knowledgeable about local events -- might well know by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the cross and any messages which might reasonably be associated with this display by the Klan. Moreover, the reasonable observer would likely know that a menorah was displayed during the

celebration of Hanukkah, and a Christmas tree has been displayed throughout the month of December. From all of this, the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism.

The fact that plaintiffs have chosen to display a Latin cross rather than some other religious symbol does not alter this Court's conclusions. The Grand Rapids decision does not expressly limit itself to those religious symbols which are most commonly or naturally associated with a particular holiday season. Indeed, a more recent Sixth Circuit decision indicates that the appellate court views crosses in much the same light as menorahs. See Congregation of Lubavitch v. City of Cincinnati, 997 F.2d 1160, 1164 (6th Cir. 1993):

> It is settled law in this circuit that a city does not violate the Establishment Clause by permitting a private organization, during the observance of Chanukah, to erect a large unattended menorah in a public square that is a traditional public forum. Americans United for Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538 (6th Cir. 1992) (en banc). Also, at this late date it cannot be argued that the display of such an object as a menorah or a cross is not "symbolic speech" that is protected by the free speech provisions of the First Amendment. Cf. Texas v. Johnson, 491 U.S. 397, 404, 109 S.Ct. 2523, 2539, 105 L.Ed.2d 342 (1989).

Based on the foregoing, the Court concludes that the defendants have failed to demonstrate under the facts of this case that the reasonable observer would construe the erection of a Latin cross on the Capitol Square during the holiday

season as an endorsement of religion.

CONCLUSION

The plaintiff in this case bears a name which in the public conscience has come to represent racial hatred, a name which has been historically associated with violence against minorities. It is ironic and in the most literal sense diabolical that a group bearing this name would seek to publicly display the symbol of Jesus of Nazareth known to Christians and non-Christians alike as the Prince of peace. It should be obvious, however, that the constitutional right of freedom of speech would be meaningless if it did not apply equally to all groups, popular and unpopular alike. Plaintiffs are entitled to an injunction requiring the defendants to issue a permit to erect a cross on Capitol Square for the remainder of the time between today's date and December 24, 1993.

It is so ORDERED.

JAMES L. GRAHAM
United States District Judge

DATE: December 21, 1993

BEFORE THE CAPITOL SQUARE REVIEW AND ADVISORY BOARD

In re:	:	
	:	
Application for Permit to Erect a Cross for Christmas by Knights of the Ku Klux Klan from December 8 to December 24, 1993	:	Hearing Examiner Keith S. Mesirow

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REPORT AND RECOMMENDATION OF HEARING EXAMINER

This matter came on for consideration pursuant to Ohio Revised Code Chapter 119 and Ohio Administrative Code Sections 128-4-04(A) and (B). Appellant, Knights of the Ku Klux Klan ("Appellant"), challenges the Capitol Square Review and Advisory Board's denial of Appellant's request to erect a cross on the grounds of the Ohio Statehouse from December 8 through 24, 1993.

Benson Wolman and David Goldberger, attorneys at law, representing the Knights of the Ku Klux Klan, and Richard A. Cordray and Christopher S. Cook, Assistant Attorneys General, representing the Capitol Square Review and Advisory Board, presented their respective positions at a hearing held on December 17, 1993. Also appearing at the hearing were Andrew Sutter and Drew Bergman,

Assistant Attorneys General.

The parties introduced and this Hearing Examiner accepted into evidence Stipulations of Fact pertinent to this matter. Also introduced into evidence were various other documents, including the affidavits of Ronald T. Keller, Executive Director of the Capitol Square Review and Advisory Board, Dr. Dennis Anderson, President of Trinity Lutheran Seminary, Vincent J. Pinette, Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm), Rabbi Harold J. Berman, and Cynthia Weikart, employee of the Attorney General of Ohio.

Based upon the evidence submitted, including the stipulations and affidavits hereinabove referenced, this Hearing Examiner makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Capitol Square comprises an entire city block in downtown Columbus, Ohio. The block is located south of Broad Street, north of State Street, east of High Street, and west of Third Street. (Stipulation 1).[8]

2. The State of Ohio owns Capitol Square and has erected the State's capitol building (the Statehouse) on that property. (Stipulations 2 and 3).

3. The Capitol Square Review and Advisory Board (the "Board") was created by statute in January 1993. (Stipulation 10).

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[8] The parties' Stipulations of Fact are referenced herein by paragraph as "Stipulation __."

4. The Board has statutory authority to operate the Capitol Square and to regulate all uses of the Capitol Square. (Stipulation 11).

5. In August 1993, the Board granted a permit requested by Vincent J. Pinette, Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm) authorizing Pinette and his associates to hold a rally on the Capitol Square grounds on October 23, 1993. (See Affidavit of Pinette, Paragraph No. 5).

6. On October 23, 1993, Vincent Pinette and his associates held a rally on the Capitol Square grounds on the north side of the Statehouse. (See Affidavit of Pinette, Paragraph No. 5).

7. Law enforcement officers from the State Highway Patrol, the Columbus Police Department, and the Franklin County Sheriff's Office were deployed on the scene of the October 23, 1993 rally. (See Affidavit of Pinette, Paragraph No. 8).

8. On October 26, 1993, the Board submitted a bill in the sum of $15,116.76 to the Appellant seeking reimbursement for security-related costs associated with the October 23, 1993 rally. (See Affidavit of Pinette, Paragraph No. 11).

9. The Appellant has not paid the bill submitted by the Board, and has, through counsel, represented that it will not pay this bill in the future.

10. In accordance with R.C. Chapter 119, the Board has promulgated regulations governing public use of the Capitol Square buildings and grounds, which regulations became effective on October 29, 1993. (Stipulation 12).

11. In recent years, certain displays have been placed upon the Capitol Square for limited periods of time during the month of December. (Stipulation 16).

12. For the past several years, the displays placed upon the Capitol Square for limited periods during the month of December have included a Christmas trees [sic] and a free-standing Hanukkah menorah. (Stipulation 17).

13. On November 23, 1993, the Board met and voted to approve the displays of a Christmas tree and a menorah upon the Capitol Square. (Stipulation 22).

14. On November 29, 1993, Rabbi Capland submitted an application for a permit to display a menorah upon the Capitol Square from December 8 through 16, 1993. (Stipulation 23).

15. On November 29, 1993, the Board approved Rabbi Capland's application. (Stipulation 23).

16. On November 29, Donnie Carr, representative of the Appellant, submitted an application to the Board seeking a permit on behalf of the Appellant for the display of a Latin cross on the Capitol Square (on the front of the Statehouse lawn) from December 8, 1993 through December 24, 1993. (Stipulation 24; Application of Carr).

17. Mr. Carr's application, which was completed in handwriting, bears a handwritten comment indicating that the Board's bonding requirement "does not apply." (Application of Carr).

18. By letter dated December 3, 1993, the Board's Executive Director, Mr. Ronald T. Keller notified Mr. Carr that the Board had denied the Appellant's application and

notified Mr. Carr of the Appellant's right to administrative appeal of the Board's determination. (Stipulation 25).

19. A Christmas tree has been displayed on the Capitol Square grounds from December 7, 1993 to the present time. (Stipulation 39).

20. A menorah was displayed on the Capitol Square grounds from December 8, 1993 until December 16, 1993. (Stipulation 39).

21. On December 9, 1993, the Appellant submitted a Notice of Appeal to the Board seeking administrative review of the decision to deny the permit requested by the Appellant. (Stipulation 27).

22. On December 10, 1993, the Board notified the Appellant that the Board would waive defects in the Appellant's notice of appeal, except that the Board would require the Appellant to submit a concise statement of the reason the appeal should be granted, as required by Board regulations. (Stipulation 29).

23. On December 13, 1993, the Appellant submitted a concise statement of the reasons the appeal should be granted. (Stipulation 32).

24. On December 17, the parties participated in an administrative hearing before this Hearing Examiner.

CONCLUSIONS OF LAW

1. Under Ohio Revised Code Section 123.022, the Capitol Square Review and Advisory Board bears responsibility for operating the Capitol Square and promulgating regulations governing use of the buildings and

grounds of Capitol Square. The Board has exercised its statutory authority and promulgated Ohio Administrative Code Chapter 128. Individuals or organizations wishing to use Ohio's capitol buildings or grounds are subject to the provisions of this Chapter.

2. Section 128-4-02 of the Ohio Administrative Code authorizes public use of the capitol buildings or grounds if the applicant adheres to a stated procedure for requesting such use, and if the proposed use:

(1) Does not interfere with the primary use of the capitol buildings or grounds;

(2) Is appropriate to the physical context of the capitol buildings or grounds;

(3) Does not unduly burden the managing authority;

(4) Is not a hazard to the safety of the public or state employees; and

(5) Does not expose the state to the likelihood of expenses and/or damages which cannot be recovered.

3. In addition, O.A.C. Section 128-4-03(O) interposes additional prerequisites to the approval of a request for use of the capitol buildings or grounds. That regulation states as follows:

> Liability - any individual or organization requesting to use the capitol buildings or grounds shall indemnify the state of Ohio, from and against all claims, demands, actions

> or causes of action, together with any and all losses, costs or related expenses asserted by any persons [sic] or persons for bodily injury or damage to property arising out of or in any way connected with the use of the capitol buildings or grounds.

4. The evidence adduced at the hearing in this matter does not offer a complete explanation of the process or basis for the Board's denial of the Appellant's request. Board Executive Director Keller did, however, advise the Appellant that the Board denied its request on advice of counsel, who had raised constitutional objections to the request. The record does not establish whether other objections were raised by the Board's counsel.

5. In the present case, the Appellant, through its representative Donnie Carr, submitted to the Board an application to place a cross on the Capitol Square grounds from December 8 through 24, 1993. By asserting the inapplicability of the Board's bonding requirement, a facially neutral requirement designed to protect the state for damage done to the Capitol Square grounds during the period of public use of the grounds, and by refusing to reimburse the State for expenses incurred in a prior use of the Capitol Square grounds, the Board could properly deny the requested permit under O.A.C. Sections 128-4-02(5) and 128-4-03(O).

6. Notwithstanding the regulatory restrictions pertinent to this case, both parties rely on Constitutional arguments in support of their positions. The First Amendment of the U.S. Constitution provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of religion." The Board contends that the "establishment clause" prohibits the display of appellant's Latin cross display, yet does not prohibit the

display of a menorah on the Capitol Square grounds. Appellant argues that the Board's refusal to permit display of the Appellant's cross, after having permitted the display of a menorah, denies the Appellant equal protection of the law, as guaranteed by the Fourteenth Amendment to the U.S. Constitution, and also interferes with the Appellant's free exercise of religion.

7. In *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989), a plurality of Supreme Court Justices determined that the display of an Hanukkah menorah in front of a city/county office building did not violate the establishment clause, where the menorah was located next to a Christmas tree and other secular displays. By plurality decision, the Court also concluded that the display of a creche within a county courthouse did violate the establishment Clause, where the creche was displayed alone in a prominent position inside the courthouse.

8. Central to the Court's decision in *Allegheny* was the concept that "government may celebrate Christmas in some manner and form, but not in a way that endorses Christian doctrine." 492 U.S. at 601. The prohibition against governmental endorsement of religion "preclude[s] government from conveying or attempting to convey a message that religion or a particular religious belief is *favored or preferred*." *Id.* at 593 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (emphasis added in *Allegheny*).

9. As noted in Justice Blackmun's opinion in *Allegheny*, both Hanukkah and Christmas have become secular, as well as sectarian, holidays and that symbols associated with those holidays, including the menorah, likewise have cultural significance extending well beyond the religious sphere. 492 U.S. at 582-87.

10. It is well settled that the Latin cross is a primary symbol of the Christian faith. Unlike the menorah, the Latin cross is generally regarded as having a purely sectarian purpose (ie. to advance or endorse the Christian religion). *See, e.g., American Civil Liberties Union v. Mississippi State General Services Administration*, 652 F.Supp. 380, 383 (S.D.Miss. 1987). Several courts have determined that the establishment clause prohibits the display of a Latin cross on government property on the grounds that such display constitutes an impermissible endorsement of the Christian faith. *See, e.g., Harris v. Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 3025, *cert. denied*, 112 S.Ct. 3054; *American Civil Liberties Union v. Rabun*, 678 F.2d 1379 (11th Cir. 1982), *mod., reh. denied*, 698 F.2d 1098 (lighted cross in state park violates clause); *American Civil Liberties Union v. City of St. Charles*, 622 F.Supp. 1542 (N.D.Ill. 1985), *aff'd*, 794 F.2d 265 (7th Cir.), *cert. denied*, 479 U.S. 961 (1986)(granting preliminary injunction prohibiting city's display of lighted Latin cross on city fire department building).

11. On November 23, 1993, the Board concluded that it would permit the display of a Christmas tree and a menorah on the Capitol Square grounds. The Board's decision in this regard is supported by *Allegheny* and is not at issue in this appeal. Nor is there any evidence in the record indicating that the applicant for the permit seeking the display of the menorah failed to comply with any requirements of O.A.C. Chapter 128.

12. The evidence in the record before this Hearing Examiner establishes that Appellant refused to comply with Chapter 128 of the Administrative Code by rejecting responsibility for expenses incurred by the State in connection with the Appellant's proposed display. If the Board were to approve the Appellant's permit application,

notwithstanding the Appellant's insistence that it is not subject to the Board's bonding requirements, the Board would essentially place the Appellant and the Appellant's religious symbol above the law. Such treatment would constitute an impermissible endorsement of one religious symbol over others. The Appellant has made no argument that this neutral bonding requirement has been discriminatorily applied or is otherwise unconstitutional, either facially or as applied.

13. Quite apart from the impact of Chapter 128 of the Administrative Code, relevant federal case law indicates that displays of menorahs and other symbols having both secular and sectarian significance during the holiday season do not run afoul of the Constitution, while displays of the Latin cross, which has a uniquely sectarian purpose does violate the establishment clause. *See Allegheny, supra; Mississippi State, supra.*

14. The conclusions reached herein are not elevation of form over substance and should not be so construed. The First Amendment requires a delicate balance of the rights of all concerned parties. To permit Appellant to choose which of the statutory and/or administrative mandates it will follow, while demanding that all other permit applicants rigidly adhere to those mandates, would subject the Board to claims of preference of one religious symbol over another. Clearly, such a result is untenable.

15. The Board is without authority to defy the strictures of the Constitution or to ignore the regulations set forth in O.A.C. Chapter 128. Had the Board granted the Appellant's application for a permit under the circumstances presented herein, the Board's action would have been violative of its strict mandate to comply with all Constitutional proscriptions and all governing statutes and rules.

Based upon all of the foregoing, it is this Hearing Examiner's opinion that the Board's denial of the Appellant's request was proper and should stand.

_____ _____

Date Keith S. Mesirow, Hearing Examiner

A38

CAPITAL SQUARE REVIEW AND ADVISORY BOARD et al.

v.

Vincent J. PINETTE et al.

No. A-517.

Dec. 23, 1993.

Justice STEVENS, Circuit Justice.

Today is Thursday, December 23, 1993. Yesterday evening petitioners filed with me, in my capacity as Circuit Justice for the Sixth Circuit, an application for a stay of an injunction entered by the District Court and upheld by the Court of Appeals. The injunction required petitioners to allow the respondents, the Knights of the Ku Klux Klan and its leading officers, to erect a large Latin cross in front of the Ohio Statehouse in Columbus, Ohio. As I understand the situation, the cross is in place now and is scheduled to be removed tomorrow. If I were to grant the application forthwith, it would be removed today--unless, of course, respondents could persuade the full Court to reinstate the injunction.

The case is unique because the District Court found that the local government has effectively disassociated itself from the display:

> "Indeed, the 'reasonable' observer--being an individual who is knowledgeable about local events--might well know by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the

> cross and any messages which might reasonably be associated with this display by the Klan. Moreover, the reasonable observer would likely know that a menorah was displayed during the celebration of Hanukkah, and a Christmas tree has been displayed throughout the month of December. From all of this, the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." No. C2-93-1162 (SD Ohio, Dec. 21, 1993), p. 13.

In their application, petitioners do not dispute the accuracy of that finding.

Whether or not petitioners' legal position is sound (and my opinion in *Allegheny County v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 646-655, 109 S.Ct. 3086, 3129-3133, 106 L.Ed.2d 472 (1989) explains why I am not unresponsive to their arguments), they must shoulder the burden of persuading me that irreparable harm will ensue if I do not grant their application. Frankly, it is my opinion that whatever harm may flow from allowing the privately owned cross to remain in place until tomorrow has probably already occurred. Moreover, because the legal issues are presumably capable of repetition, I do not believe the case will become moot when the cross is removed tomorrow. Rather than asking my colleagues to resolve those issues summarily, applicants may be well advised to marshal their arguments in a certiorari petition that can be considered with appropriate deliberation.

For these reasons, I shall defer to the judgment of the Court of Appeals and deny the application.

It is so ordered.

No. 93-4367

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

VINCENT J. PINETTE; DONNIE A. CARR; KNIGHTS OF THE KU KLUX KLAN, Ohio Realm,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
CAPITAL SQUARE REVIEW AND ADVISORY BOARD; RONALD T. KELLER; DANIEL SHELLENBARGER; RICHARD H. FINAN, Senator,	)	
Defendants-Appellants.	)	

BEFORE: KENNEDY and NELSON, Circuit Judges; and ENGEL, Senior Circuit Judge.

Defendants appeal an injunction requiring them to issue to plaintiffs a permit to erect a cross on Capital Square in Columbus, Ohio. They now seek an emergency stay of the injunction pending appeal. Plaintiffs oppose the motion for a stay.

The factors to be considered in ruling on the motion for a stay are: 1) whether defendants have made a strong

showing that they are likely to succeed on the merits; 2) whether defendants will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other interested parties; and 4) where the public interest lies. Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991); Congregation Lubavitch v. City of Cincinnati, 923 F.2d 458, 460 (6th Cir. 1991); American United for Separation of Church and State v. Grand Rapids, 922 F.2d 303, 306 (6th Cir. 1990). In ruling on the motion for a stay, we are not reviewing the district court's grant of the injunction, but we are "bound to accept the district court's factual findings unless we find them to be 'clearly erroneous.'" Congregation Lubavitch v. City of Cincinnati, 923 F.2d at 460.

The district court found that Capital Square is a traditional public forum. The First Amendment requires that any restrictions on the use of such a forum be content neutral, narrowly tailored to serve a significant governmental interest, and leave ample alternatives for communication. United States v. Grace, 461 U.S. 171, 177 (1983). Discrimination against religious speech on the basis of its content can violate the First Amendment. See Widmar v. Vincent, 454 U.S. 363 (1981); Americans United for the Separation of Church and State v. City of Grand Rapids, 980 F.2d 1538, 1542 (6th Cir. 1992) (en banc).

Defendants argue that the State of Ohio violates the Establishment Clause by permitting plaintiffs to erect a large, unattended cross on Capital Square during the Christmas holiday. The cross, however, is privately sponsored and is to be erected in a public forum. Thus, defendants have not made a strong showing that they are likely to succeed on the merits of their appeal. See Congregation Lubavitch v. City of Cincinnati, 997 F.2d 1160, 1164 (6th Cir. 1993);

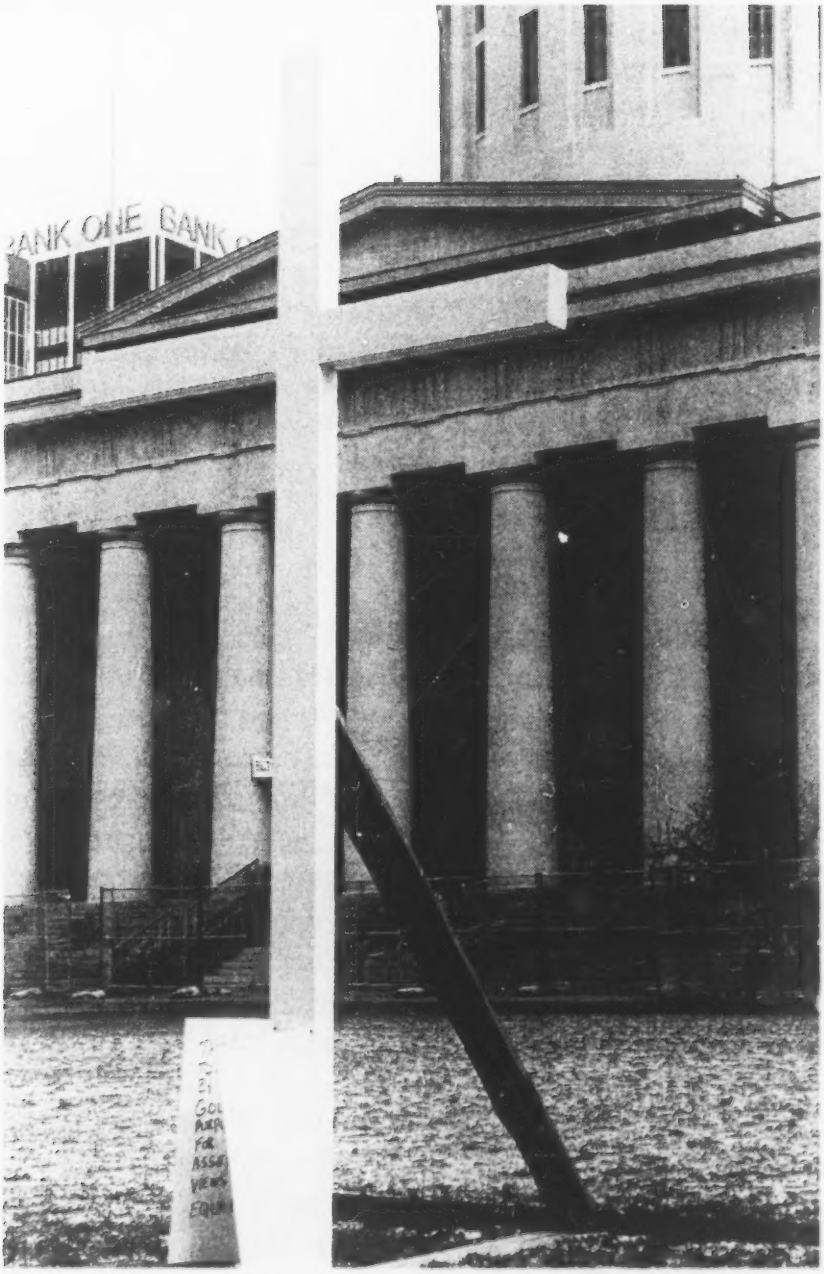
Americans United for the Separation of Church and State v. City of Grand Rapids, 980 F.2d at 1543-48.

It therefore is ORDERED that the motion for a stay pending appeal is denied.

ENTERED BY ORDER OF THE COURT

_____

Clerk



*This photograph was included in the parties' stipulated Submission of Supplemental Exhibits filed on March 22, 1994.

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 94-780

In The

Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, AND RICHARD H. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an injunction preventing public officials from discriminating against a display of a cross by the Ku Klux Klan on a public forum open to other political and religious symbols violates the Establishment Clause of the First Amendment?

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Respondents respectfully urge the Court to deny the Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 30 F.3d 676 (6th Cir. 1994) and is appended to the Petition for *Certiorari* at A1-A12.[1]

At the District Court level, the Court *sua sponte* divided its proceedings into two segments. An Opinion and Order was entered for each segment. Both shared a common nucleus of operative facts. The opinion directly resulting in the Petition for *Certiorari* is reported at 844 F. Supp. 1182 (S.D. Ohio 1993) and is appended to the Petition at A13-A26; the other opinion is unreported and is included in the Respondents' Appendix at RA1-RA10.[2]

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[1] References to the Appendices contained in the Petition are identified herein as A1, A2, etc. References to the Respondents' Appendices contained in this Brief in Opposition are identified herein as RA1, RA2, etc.

[2] Respondents' Complaint and Amended Complaint raised two issues: one was related to erection of the Klan's cross near the menorah; the other was related to an issue of a denial of a permit to the Klan to hold a rally on Capitol Square in January 1994. Two hearings were set: one was primarily devoted to the cross issue, and the other was primarily devoted to the rally. References herein to the record include R. 9: TR I (record of hearing of December 20, 1993), and R. 23: TR II (record of the morning portion of the hearing of January 3, 1994) and R. 23: TR III (record of the hearing of the afternoon of January 3, 1994).

The Respondents do not challenge that the events herein are "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975).[3]

INTRODUCTION

The primary issue in this case is whether the State[4] can bar from a quintessential public forum a Ku Klux Klan cross displayed to advocate the Klan's political and religious views when the State permits other political and religious displays. The State's petition attempts to recharacterize the issue as whether or not the Establishment Clause permits private groups to erect religious

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The December 20 hearing focused on injunctive relief regarding the cross which the District Court granted on December 21, 1993. 844 F. Supp. at 1188. The January 3 hearing focused mainly on discriminatory treatment, injunctive relief related to the rally, and a claim for damages; the Court issued the injunction permitting the rally and denied damages. RA10, *Pinette v. Capitol Square Review and Advisory Board* (Case No. C2-93-1162, U.S.D.C. S.D. Ohio, Opinion and Order of January 4, 1994). The subject of the Petition before this Court is the injunction ordering the Petitioners to grant the permit to erect the Klan's cross; the State did not appeal the injunction ordering the State to grant a permit for the rally. The record of both hearings constitutes the record on appeal, together with a supplemental record from the District Court.

[3] Although not in the record, the Respondents have indicated through public statements in the press that if a menorah again is permitted in 1994, Respondents again will seek to erect their display.

[4] The word "State" is frequently used herein to refer to the Petitioners: the Capitol Square Review and Advisory Board, its executive director, its spokesperson, and its chairperson.

displays in front of government buildings. That issue, however, is not properly presented by this record, which indisputably shows that the State has voluntarily permitted other religious and secular entities to erect other religious symbols. In previous years a Chanukah menorah and a Christmas tree were erected in this same forum in which the Klan sought to erect its cross. Thus, the critical question in this case is whether the State can discriminate against particular religious symbols and particular political viewpoints. Both lower courts correctly recognized that such discrimination is unconstitutional. Those rulings are clearly consistent with prevailing law and do not merit this Court's plenary review.

STATEMENT OF THE CASE

Statement of Facts

The issue before the Court is the Respondents' access to the large park-like area, a block wide, on one side of the State capitol building in Columbus, Ohio.[5] Both the

[5] The public forum portion of Capitol Square at issue in the case at bar (there are additional fora on other sides of the Statehouse) measures 250 feet by 640 feet. Stipulation 12; this 156,000 square feet comprises over 3 1/2 acres. A view of the forum – from a somewhat different perspective than presented at A43 of the Petition – is included at RA31 and RA32, Plaintiffs' Supplemental Exhibits 105 and 106 (the originals of these two stipulated exhibits are in color). These and Supplemental Exhibits 101, 102, and 103 were stipulated by the parties and made part of the District Court record on March 22, 1994.

District Court, A17 (844 F. Supp. at 1183),[6] and the Court of Appeals, A6 (30 F.3d at 678), concluded that this area is a traditional public forum. Indeed, Petitioners do not dispute the public forum designation, and it is well established as a matter of state law: "Capitol . . . grounds are available for use by the public . . . for free discussion of public questions. . . . " Ohio Administrative Code Section 128-04-02(A). As the District Court further found, many unattended[7] displays have been permitted in the public forum. Most relevant for this case, for the past several years, the State of Ohio has erected a Christmas tree, and the Lubavitcher sect has displayed a large Chanukah menorah in Capitol Square. A14 (844 F. Supp. at 1183).

On October 29, 1993, the Klan applied for a permit to hold a demonstration in Capitol Square. RA1. On November 18, 1993, while this rally permit application was still under consideration, the Capitol Square Board voted *sua sponte* to bar display of both the State Christmas tree and the Lubavitch sect's menorah from Capitol Square during December 1993. A14 (844 F. Supp. at 1183). At the time, the Klan had not yet sought a permit to erect a cross in Capitol Square. Nevertheless, the Petitioners decided to

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[6] In its opinion in the second segment of the proceeding, the District Court also said this was an "archetypal public forum" "from time immemorial." RA6 (*Pinette*, Opinion and Order of January 4, 1994).

[7] "Unattended" herein means that the given display has been permitted to remain up overnight without accompanying ongoing personnel or ceremonies. It is clear that as some unattended displays are set up, there are attendant ceremonies; see, for example, RA23 (Plaintiffs' Supplemental Exhibit 101, Governor's participation in dedication of menorah).

bar the Christmas tree and the menorah solely to foreclose any claim to equal access that the Klan might present. RA12 (Plaintiffs' Exhibit 33, Broadcast No. 5, Statements of Bill Cohen and Petitioner Finan).[8]

The decision of the State to bar the tree and menorah resulted in a great public uproar. A statement was released by the Office of the Governor. According to the statement, "People of this great State think that we ought to have a Christmas tree and think that we ought to have a menorah at the Statehouse and so do we. We've had a Christmas tree at the Statehouse for tens of years and you can't let a single group or groups of people dictate to the people of Ohio what they are and aren't going to do." RA14 (Plaintiffs' Exhibit 33, Broadcast No. 6, Statement of Mike Dawson, Press Secretary to the Governor.) Newspaper accounts described the Governor as "disappointed and upset." RA20 (Defendants' Exhibit D, *The Columbus Dispatch*). The Governor was also quoted as saying: "The Board's initial decision was a mistake. I trust this matter will be resolved quickly." *Id.*

Consistent with these public statements, the Governor and the other State officials who appoint the members of the Board,[9] signed and delivered to the Board a letter calling upon the Board to permit the tree and menorah. *Id.* The Board met in special session on November 23, 1993, declared its earlier vote invalid, and

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[8] The Petitioners assumed that the Klan would seek to erect a cross near the menorah as a Klan group had done in Cincinnati. RA17 and RA22, Defendants' Exhibits C and D.

[9] Ohio Revised Code Section 123.022.

approved the displays of the Christmas tree and a menorah by a nine-to-zero vote. The reason for the change in vote was explained by Board Chairperson, and Petitioner herein, Richard Finan, "I've been in politics for twenty-one years. When you get a letter from the Governor, the Speaker, and the President of the Senate, you do respond," he said. RA16 (Plaintiffs' Exhibit 33, Broadcast No. 8).

The State Christmas tree was erected on December 7, 1993. A16 (844 F. Supp. at 1184). On November 29, 1993, Rabbi Chaim Capland applied, as in prior years, for a permit to erect a menorah on Capitol Square from December 8 through December 16, 1993. That permit was granted on November 29, 1993, the same day as the application was submitted. A15 (844 F. Supp. at 1183).

Also on November 29, shortly after learning from press reports that the State would be permitting the menorah but not the Klan cross,[10] the Klan applied for a permit to display their cross on the Capitol Square forum from December 8 through December 24, 1993. The Klan filed its application in order to establish its right of access to the Capitol Square public forum. Respondents' application was denied on December 3, 1993.

In an effort to resolve the differences between the parties, the Respondents sent a letter to the Petitioners explaining that accompanying the cross would be a disclaimer with a political message to the effect that "this cross was erected by private individuals without government support for the purpose of expressing respect for

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[10] RA17-RA18, Defendants' Exhibit C.

the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." A15-A16 (844 F. Supp. at 1183-84).[11]

On December 15, 1993, Respondents filed the instant action in U.S. District Court in Columbus. A hearing to consider Respondents' request for injunctive relief was held on December 20, 1993. A13 (844 F. Supp. at 1183). During the hearing, undisputed evidence was presented showing that there is no policy against unattended displays being erected on the forum at Capitol Square. The evidence also showed that political speeches, gay rights demonstrations, anti-war demonstrations, demonstrations regarding various types of public issues were routinely allowed there, as well as booths and other displays erected during arts festivals, a united fund campaign "thermometer," the State Christmas tree, and the menorah. *Id.* (844 F. Supp. at 1183-84).

Respondent Donnie A. Carr testified that the reason the Klan had applied for its display was that he had heard that the State was not going to permit a tree or a menorah but that in the wake of public pressure, the State reversed itself and decided to permit just a tree and a menorah but not a Klan cross. Donnie Carr at TR I 42-44. Mr. Carr said that his political motivation for filing the request was that "since we were being excluded by the city or the state, the Capitol Square Review and Advisory Board, that we would attempt to obtain a permit to erect

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[11] Counsel for the Klan also invited State suggestions concerning the disclaimer. *Id.*

a cross for the Christmas season." *Id.* Mr. Carr also testified that while the cross has a religious connotation to the Klan, it also has other applications: "To us, it is a sacred symbol, but it is also a symbol of going against tyranny, a symbol of freedom." *Id.* at TR I 51. He noted that the "Klan's use of the cross originated from the early Scottish Klans in Scotland in the 1300's which used the cross as a symbol to rally the clans together to fight against their English oppressors." *Id.* And, Mr. Carr elaborated that other special meanings of the cross include "as a symbol of freedom, as a symbol of trying to unite our people . . . as a symbol of freedom from tyranny. The cross was also incorporated in the Confederate battle flag. . . . " *Id.* at TR I 61.

Cantor Jack Chomsky of Tifereth Israel Congregation in Columbus, Ohio testified as an expert that the menorah permitted by the State of Ohio, like other Chanukah menorahs, "is a religious symbol. It is used in conjunction with fulfilling the obligations incumbent upon a Jew for the celebration of the festival of Chanukah." He also stated that he took "exception" to the State's contention that the menorah was a seasonal display and "not a religious symbol." Cantor Jack Chomsky at TR I 70-71. He added that Jews have an obligation to "put candles in it as appropriate, as prescribed by our tradition, and they recite blessings which state as part of the blessings that we were commanded to perform this act. Blessings such as this make this into very much a ritual act." *Id.* at 75-76.

The Decisions Below

The District Court found that the evidence established that the area in question had been used for many years by many groups to express many different ideas and for a variety of displays. A14 (844 F. Supp. at 1183-1184). The Court found that there was no policy against free-standing displays in Capitol Square and that for many years unattended displays have been placed on Capitol Square for limited periods including, during December, a free-standing Christmas tree and a free-standing menorah, the latter being a religious symbol, "a nine-branch candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah." *Id.* The Court observed that one of the Board's reasons for denying the Klan's application – the purported failure of the Klan to post a bond – was "not a proper ground for the denial of the permit . . . " and that the State "does not contend that the erection of a cross poses a security risk of any kind." A16 (844 F. Supp. at 1184). The Court concluded that "the State of Ohio is in no way associating itself with the Klan's display," that there was no appearance of endorsement of religion, and that "the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." The Court then held that "freedom of speech would be meaningless if it did not apply to all groups, popular and unpopular alike." A26 (844 F. Supp. at 1187-88).

The Court then granted the injunction requiring the State to approve a permit for the Klan to display a cross and statement through December 24, 1993. Following the judicial proceedings, there were barely two days left to

prepare and display the cross and its accompanying statement; the display was set in place in the early morning hours of December 22, 1993. RA24-RA30 (Plaintiff's Supplemental Exhibits 102 and 103; these same exhibits, as well as RA31 and RA32, indicate the subsequent history of this and other displays).

The Sixth Circuit affirmed on Free Speech, Free Exercise, and Equal Protection grounds. A6-A7, A11-A12 (30 F.3d at 677-78, 680). That Court rejected Petitioners' claim that there was any endorsement of religion by the State in this case. To the contrary, it asserted that, on the facts here, the State could not rely upon "the fanciful perceptions of some hypothetical dolt" that the Klan cross was endorsed by the State. A9 (30 F.3d at 679).

REASONS FOR DENYING THE WRIT

I. THE COURT BELOW APPLIED WELL-SETTLED LAW IN HOLDING THAT THE KU KLUX KLAN IS ENTITLED TO ACCESS TO A PUBLIC FORUM TO EXPRESS UNPOPULAR POLITICAL AND RELIGIOUS VIEWS ON THE SAME BASIS AS OTHERS WITH MORE POPULAR VIEWS.

The record and the decisions below make it clear that the denial of the permit to Respondents was discriminatory, based entirely on who they are and what they stand for.

In what is perhaps the greatest of understatements in this case, the Sixth Circuit pointed out that "there is no indication that Ohio treated the Klan or its display favorably." Indeed, the Court went on to identify the readily

apparent political discrimination against the Klan, noting that "Zealots have First Amendment rights too. Some speech may be distasteful, unpopular, and outright offensive. . . . " A11 (30 F.3d at 679). Applying the First *and* Fourteenth Amendments, the Circuit relied upon Justice Marshall's opinion in *Police Department of Chicago v. Mosley*:

> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

A11-A12 (30 F.3d at 680), quoting *Mosley*, 408 U.S. 92, 96 (1972) (footnote omitted by the Circuit).

The conclusion of the court below is supported by the pronouncements of this Court over more than half a century. It is abundantly clear that unpopular views cannot be the basis for denial of access to a traditional public forum.

Here, the Klansmen sought to place their symbol and political statement in what is unquestionably a public forum. As this Court has long recognized, such fora "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. 496, 515 (1939). Thus, "[g]overnment may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Carey v. Brown*, 447 U.S. 455, 461-62 (1980). In the case at bar, the discrimination against Klan political and religious views is clearly content-based and is subject to the *Carey* principle that "[s]elective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 462-463. Accord, *Mosley*, 408 U.S. at 96; *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

In the case at bar, the only justification offered for the content discrimination is the Establishment Clause, but the State cannot plausibly rely on the Establishment Clause when it permits other religious displays. At a minimum, the Establishment Clause prohibits such religious favoritism.

This rule of nondiscrimination is well-settled law. In *Niemotko v. Maryland*, 340 U.S. 268 (1951), this Court unanimously held invalid a "practice" in which an administrator's standardless judgment was used as a device to prevent a group of Jehovah's Witnesses from holding a Bible study meeting in a public park. After finding that the license was denied because of the city council's disagreement with the views of the Witnesses,

the Court concluded: "The right to equal protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments, has a firmer foundation than the whims or personal opinions of a local governing body." *Id.* at 671-72. Again, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), the Court reiterated that the First Amendment was violated when a Jehovah's Witness religious service was treated differently than those of Catholics or Protestants. *Id.* at 69-70.

Likewise, in *Larson v. Valente*, 456 U.S. 228 (1982), the Court was emphatic: "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. As the Court concluded in *County of Allegheny v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), "[w]hatever else the Establishment Clause may mean . . . , it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed. . . . " 492 U.S. at 605.

The District Court below found the Klan's cross to be a religious symbol, A25 (844 F. Supp. at 1187), just as this Court has held that "[t]he menorah, one must recognize, is a religious symbol." *Allegheny*, 492 U.S. at 613. To ban the former while permitting the latter, as the Petitioners seek to do, clearly "contradicts the fundamental premise of the Establishment Clause itself. The anti-discrimination principle inherent in the Establishment Clause necessarily means that would-be discriminators on the basis of religion cannot prevail." *Id.* at 611.

In this case, the State has committed two forms of constitutionally prohibited discrimination: first, it has discriminated among religions; second, it has treated Respondents' religious speech less favorably than other non-religious expression that it regularly permits in Capitol Square. The latter form of discrimination in a public forum is equally inconsistent with this Court's precedents. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court upheld the use for religious purposes of public university facilities that were otherwise available for use for secular gatherings.

Subsequently, the Court applied nondiscrimination to religious expression in a public school. *Board of Education of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990). *Mergens* involved an Establishment Clause attack upon an act of Congress that required federally funded schools to allow religious groups to meet on school premises when schools permitted other non-school related groups to do so. In *Mergens*, the Court was dealing with a "limited open forum" not even the broader, quintessential forum that exists at the Ohio Capitol grounds.

Most recently, in *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993) the Court again unanimously upheld the right of a church, deemed by the school to be "radical", to show a film espousing religious values, where the showing would have been after school, open to the public, and not sponsored by the school. *Id.* at 2143-44. Justice Kennedy noted "the unanimity of our conclusion that this overt, viewpoint-based discrimination contradicts the Free Speech Clause of the First Amendment. . . . " *Id.* at 2149 (Kennedy, J., concurring).

Here, the Klan's display (RA25, RA29), with its own statement and disclaimer,[12] stood within the vast public forum area: the cross was free-standing, not placed in the ground, not placed in any exalted position, was never alone on the square. It was much smaller than other items on Capitol Square (14-foot high menorah, RA23, with no disclaimer; 20-foot high Christmas tree, RA31, RA32, with no disclaimer). Given the total circumstances, it could not be conceived of as a State endorsement. Moreover, the cross did not appear elevated on any platform or stairway, it was not affixed to the side of any State building, nor was it erected on top of any State building. In short, as the District Court found, the Klan cross was part of a context of cultural diversity in a pluralistic society. A25 (844 F. Supp. at 1187).

The Capitol Square Board asserts that it is concerned about the appearance of governmental endorsement of the Klan cross and points to excerpts from *Allegheny*. Petition at 14-16. Is it the position of the State that the menorah displayed annually in Capitol Square and dedicated last year by the Governor[13] will not reasonably be understood to be State endorsement? Curiously, it is also the State's position that the Klan cross, with its attendant message, denounced by State officials, and erected after protracted litigation, is an endorsement by the State. Or, is it the position of the State that only speakers from

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[12] Counsel for the Respondents invited the State to suggest any amendments to the disclaimer that the State believed to be necessary. A16, 844 F. Supp. at 1183-84.

[13] See RA23 (Governor dedicating menorah. Plaintiffs' Supplemental Exhibit No. 101).

minority faiths may display their religious symbols on the public forum near the State Capitol? If so, then we must rely upon demographic studies to establish who has the right of expression. Of course, within this context, Klan Christianity is certainly a minority faith.

In short, it is clear that the instant case is not an appropriate vehicle to resolve the issues presented by the Petition. Rather, it is a case in which undisputed facts led to the unremarkable legal conclusion that the government can neither favor some religious expressions over others nor discriminate against unpopular political views in a public forum. On that issue, the decisions below reflect well-settled law and do not merit Supreme Court review.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS REGARDING DISCRIMINATION AGAINST CONTROVERSIAL PUBLIC STATEMENTS WHICH COMBINE RELIGIOUS AND POLITICAL VIEWS.

The distinguishing features of this case are that (a) the State has discriminated **among** religious symbols, and (b) the Klan's cross was political. That is very different from the cases upon which the State relies in suggesting a conflict between the Sixth and some other Circuits.

The Petitioners' contention (Petition, at 18) that the decision below is in conflict with the Fourth Circuit's decision in *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 74 (1990), and with the Second Circuit, *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990), ignores

those critical facts. Both *Smith* and *Kaplan* involved solitary religious displays alone in the public forum, without other attendant symbols. In *Smith*, it was a creche, 895 F.2d at 955; in *Kaplan*, it was a menorah, 891 F.2d at 1026. In the instant case, the forum was open and traditionally used for a variety of unattended displays, both religious and secular.

Moreover, in the case at bar, the Respondents sought to make a political and religious statement. That was apparent from the sign accompanying the Klan cross. It states that 1) the "cross was erected by private individuals," 2) "without government support," 3) "for the purpose of expressing respect for the holiday season," 4) "to assert the right of all religious views to be expressed on an equal basis on public property." A15-A16 (844 F. Supp. at 1183-84). Notwithstanding the disclaimer, the State made every effort to ban the display because of official hostility to the message.

On the other hand, in *Smith v. County of Albemarle*, the stipulated facts were that in front of a county offices building there was a nativity scene which was associated with "[n]o other seasonal displays," had "no secular content," was lit up at night, and was in a prominent location. 895 F.2d at 955. The record in *Smith* therefore suggests that the State officials in that case were sympathetic to the religious views expressed by the display. On such facts, the Fourth Circuit viewed the matter as falling squarely within this Court's decision in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

Likewise, in *Kaplan v. City of Burlington*, where the menorah was a solitary religious display, 891 F.2d at 1029,

the Second Circuit distinguished its facts from the facts in both *Allegheny* and *Widmar*. The *Kaplan* court noted that:

> the City, prior to the grant of the permits for the display of the menorah, had not created a forum in the City Hall Park open to the unattended, solitary display of religious symbols. Other than the menorah in question, no permits had been issued for the unattended display of any religious symbol in the park.

891 F.2d at 1029.

In the case at bar, it is uncontested that for many years, the State has granted permits for "a free-standing Hanukkah menorah, which is a nine-branch candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah." A14 (*Pinette*, 844 F. Supp at 1183). Moreover, the censorial motives of the Petitioners are clear on the record. In addition, in the case at bar, the message is political and religious, while in *Kaplan* the message was purely religious.

Accordingly, on the facts of this case, there is no conflict between the Sixth Circuit, on the one hand, and the Second and Fourth Circuits, on the other, save for dictum.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,

Plaintiffs,

vs.

Capital Square review and Advisory Board, et al.,

Defendants.

Case No.
C2-93-1162
JUDGE GRAHAM

(Filed Jan. 4, 1994)

OPINION AND ORDER

On December 21, 1993, the Court issued an Opinion and Order adjudicating the claim set forth in Count One of the Plaintiffs' Amended Complaint. This matter is now before the Court for decision after a trial on the merits of the claims set forth in Counts Two, Three and Four of Plaintiffs' Amended Complaint. The Findings of Fact and Conclusions of Law contained in the Court's Opinion and Order of December 21, 1993 are incorporated herein by reference.

FINDINGS OF FACT

Defendants granted a permit to the plaintiffs to conduct a rally at the Ohio Statehouse on October 23, 1993. On October 26, 1993, defendants submitted a bill to the plaintiffs in the amount of $15,116.76 for expenses and losses incurred by the state as a result of that rally. On October 29, 1993, plaintiffs applied to defendants for a permit to hold a rally at the Statehouse on January 15, 1994 for the dual purpose of protesting the bill they received from the state for the October 23rd rally and

expressing their opposition to the designation of the birthday of Martin Luther King, Jr. as a state and national holiday.

On December 28, 1993, defendants denied plaintiffs' application for a rally on January 15, 1994 citing plaintiffs' failure to pay the October 26, 1993 bill, their unwillingness to comply with the bond requirements contained in the permit application and on the further grounds that the plaintiffs have "engaged in a pattern of harassment and intimidation based on the use of fighting words which creates a clear and present danger to public safety."

In Count Two of the Amended Complaint, plaintiffs seek an order requiring defendants to issue a permit for the January 15, 1994 rally. In Count Three, they seek a declaratory judgment invalidating the bill of October 26, 1993 and in Count Four they seek damages for the violation of their constitutional rights.

The October 23, 1993 rally was attended by about twenty-five members of the Klan and about one thousand protesters. Security for this event required extensive planning and coordination by state, county and city law enforcement agencies. A ten foot high chain link fence was erected in order to separate the Klan from the protesters. Walk-through and hand-held magnetometers were used to detect weapons. Approximately one hundred and thirty weapons were taken from spectators. The Statehouse underground parking garage was closed for security purposes. Major thoroughfares around the Statehouse were closed. Special transportation was arranged to take the Klan members to and from the Statehouse. Over four hundred law enforcement officers

were present. These measures were successful in preventing injury and property damage. The combined cost of all security measures is estimated to be something in excess of $100,000. The City of Columbus incurred overtime costs for police and fire personnel in the amount of $57,974.37.

The October 26, 1993 bill sent to the plaintiff consists of $1,243.50 in lost revenues from the underground parking garage; $9,179 for protective fencing and $4,694.26 for labor costs described as "planning, setup, teardown, materials and cleanup."

At the time of the October 23, 1993 rally, defendants had no rules or regulations for charging applicants for security costs incurred in connection with an event and there was nothing in the permit application which would alert an applicant to the possibility that such a charge would be levied after the event.

Ohio Administrative Code §128-4-03, which became effective on October 29, 1993, provides in part as follows:

> (D) In order to protect the condition of the capital buildings or grounds and ensure the safety of all persons, the board may require a cash bond of one thousand dollars or more to be provided by the permit holder if the event involves the use of equipment, structures, vehicles, banners or signs to be placed on or attached to the capitol buildings or grounds. In lieu of a bond, the permit holder may elect to obtain a letter of credit equal to the amount of the required bond. The bond or letter of credit shall indemnify the state of ohio [sic], against danger, or destruction to, or theft of state property arising in connection with or as a result of the activity of the organization, participants or

> spectators. Such bond or letter of credit will be refundable after the use if the organization has complied with all the terms and conditions of the permit.

Defendant has no other rules or regulations or established practice to determine whether a bond should be required for an event or the amount of such bond. It is not clear whether defendants applied Administrative Rule 128-4-03(D) to plaintiffs' application for the January 15, 1994 rally. That application was filed on the very day the rule became effective. There is no evidence that the board determined that a bond would be required for that event or what the amount of any such bond should be.

When plaintiffs made application for the October 23, 1993 rally, they struck out the paragraph of the application form pertaining to bonds and inserted the words "you can't put a price on free speech." Defendants waived the bond requirement for that permit. When plaintiffs completed the application for the January 15, 1994 rally, they crossed out the paragraph number next to the paragraph pertaining to bond requirements and wrote in the words "no price on free speech." Plaintiffs paid the $20 application fee. In the past, the defendants' practice with respect to bond requirements has been to either waive the bond requirement entirely or to require a bond between $50 and $200 based on the judgment of the permit clerk. Plaintiffs were never notified that a bond was required for the January 15, 1994 rally.

The Klan members who participated in the October 23, 1993 rally conducted themselves in a peaceful and orderly manner. They were searched prior to the event and no weapons were found. The Klan protesters were unruly and threatening in their demeanor and actions.

The security measures planned for the event were in response to the anticipated violent reaction of the Klan protesters. There was no expectation that the Klan itself would engage in violence. The expenses which were billed to the plaintiffs on October 26, 1993 were not necessitated by the plaintiffs' anticipated or actual actions but were necessitated instead by the anticipated and actual actions of the Klan protesters.

At the October 26, 1993 rally, the Klan members made speeches and played audio tapes. They spoke against affirmative action, integrated schools and interracial marriage. They spoke against Jews, African-Americans and homosexuals and advocated the supremacy of the Caucasian race. They sometimes made a fascist salute and sometimes chanted "White pride" and "White power." They encouraged their adherents to arm themselves and to use all means necessary to accomplish their goals. The Klan protesters chanted "Go home Klan" and "Death, Death, Death to the Klan" and attempted to push through the protective fencing.

The Mayor of the City of Columbus and the Governor of the State of Ohio have publicly expressed their opposition to the granting of a permit for the January 15, 1994 rally. The Mayor testified about his concern for the cost of police protection and its impact on the city's already limited budget for public safety services. The Mayor and Captain Reel of the Ohio State Highway Patrol are concerned about the increased potential for violence at a rally to be held on Martin Luther King, Jr.'s birthday. However, the state has not shown that it is unable to provide adequate security for the kind of rally plaintiffs plan to hold on January 15, 1994.

CONCLUSIONS OF LAW

In its letter of December 28, 1993 denying plaintiffs' application for the January 15, 1994 rally, the defendants have cited the Administrative Appeal provisions of Chapter 119 of the Ohio Revised Code and Rule 128-4-04 of the Ohio Administrative Code. By delaying action on plaintiffs' permit until December 28, 1993, defendants have foreclosed any possibility of a timely administrative appeal from the denial of the permit. In opposing plaintiffs' request for injunctive relief, defendants have not raised any issues relating to exhaustion, finality or abstention and they have waived any such defenses or objections.

The Ohio Statehouse grounds are the archetypal public forum. They have been used from time immemorial for all manner of public gatherings and demonstrations by groups of all kinds, including political parties, charitable and religious groups, labor unions, civil rights groups and the proponents and opponents of all manner of social and political issues.

In *Cox v. New Hampshire*, 312 U.S. 569 (1941), the Supreme Court held that the First Amendment was not violated by a city ordinance which assessed a fee for conducting a parade on the city streets. The Court ruled that such a permit fee may take into consideration the expense of maintaining public order and that it may vary in proportion to the requirements of the event. *Id.* at 576-77. *See also Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), *cert. denied*, ___ U.S. ___, 112 S.Ct. 275 (1991). However, a permit scheme may not delegate overly broad discretion to a government official, the fee may not be based on the content of the message, and any

restrictions on speech or expression must be narrowly tailored to serve a significant governmental interest and must leave open ample alternatives for communication. *Forsyth County v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, 2401 (1992). Defendants' scheme for requiring and setting the amount of bonds for permits vests the Capitol Square Review and Advisory Board with unbridled discretion and is facially unconstitutional. *Id.* Defendants may not properly deny plaintiffs' application for the January 15, 1994 rally for its refusal to comply with an unconstitutional bond requirement.

A permit scheme which imposes on the speaker costs which are associated with the listeners reaction to the speech is not content neutral. "Speech cannot be financially burdened any more than it can be punished or banned, simply because it might offend a hostile mob." *Forsyth County*, 112 S.Ct. at 2404 (citing *Gooding v. Wilson*, 405 U.S. 518 (1972); *Terminiello v. Chicago*, 377 U.S. 1 (1949)) (footnote omitted). "A State may not impose a charge for the enjoyment of a right guaranteed by the Federal Constitution." *Central Florida Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1522 (1985). Defendants' attempt to charge plaintiffs for the costs of security measures necessitated by the anticipated reaction to their speech is a violation of their First Amendment rights and the state's bill of October 26, 1993 is void and unenforceable. It follows that defendants' denial of a permit for the January 15, 1994 rally on the grounds that plaintiffs have failed to pay the October 26, 1993 bill is likewise unconstitutional.

The First Amendment generally prevents the government from prohibiting speech because it disapproves of the ideas expressed. *Cantwell v. Connecticut*, 310 U.S. 296

(1940); *Texas v. Johnson*, 491 U.S. 397 (1989); *Simon and Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, ___ U.S. ___, 112 S.Ct. 501 (1991). However, constitutional jurisprudence has always recognized certain limited exceptions to this rule. The Constitution does not protect obscenity, defamation or fighting words. Fighting words are a direct personal insult or invitation to exchange fisticuffs. *Texas v. Johnson, supra,* at 409. They are not a means of exchanging views, rallying supporters or registering a protest, but are words directed against individuals to provoke violence or to inflict injury. *Chaplinsky v. New Hampshire,* 315 U.S. 568, 572 (1941).

The fighting words exception has always been narrowly construed. *R.A.V. v. St. Paul,* ___ U.S. ___, 112 S.Ct. 2538, 2567 (1992). "The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected." *Id.* at 2559. Plaintiffs' message and their methods of expression are deeply offensive to many, however, they are not fighting words in the constitutional sense. As Justice White noted in his concurring opinion in *R.A.V. v. St. Paul,* even "[b]urnng a cross at a political rally would almost certainly be protected expression. *Cf. Brandenburg v. Ohio,* 395 U.S. 444, 445, 89 S.Ct. 1827, 1828, 23 L.Ed.2d 430 (1969)." *R.A.V. v. St. Paul,* 112 S.Ct. at 2553 n.4.

Defendants have failed to show that plaintiffs have engaged in or that they are likely to engage in speech or expression which falls within the narrow definition of fighting words. The evidence does not support defendants' assertion that plaintiffs have engaged in a pattern of harassment and intimidation based on the use of fighting words and this groundless assertion is not a proper

ground for defendants' denial of plaintiffs' application for a permit to hold a rally on January 15, 1994.

In some circumstances the threat of violence may provide a sufficiently compelling state interest to justify restrictions on speech. *See Christian Knights of the Ku Klux Klan Invisible Empire, Inc. v. District of Columbia,* 972 F.2d 365 (D.C. Cir. 1992). Here, defendants have not sought to impose any restrictions on the time, place or manner of plaintiffs' speech but have instead denied their permit application entirely leaving open no alternatives for communication of the two messages they wish to express.

Plaintiffs seek an award of damages in the amount of $1,000 "for their expenditures and added time and attention necessary to secure their rights." Plaintiffs have produced no evidence of actual damages. The Capitol Square Review and Advisory Board is an arm of the State of Ohio and would be immune to liability for damages under the Eleventh Amendment. The plaintiffs have failed to show that defendants Keller, Shellenbarger and Finan who have been sued in their individual, as well as their official capacities, had any personal responsibility for the actions of which plaintiffs complain. Thus plaintiffs have failed to prove that they are liable for damages in their individual capacities. Defendants are entitled to judgment in their favor on plaintiffs' claim for monetary damages.

CONCLUSION

Thirty years ago the Reverend Dr. Martin Luther King, Jr. confronted hostile and unruly crowds in many southern cities. If the state had been free to impose the cost of security measures on him and his followers the Civil Rights movement of the 60's might have died in its

infancy. In order to insure freedom of speech, we must tolerate the free expression of ideas with which we disagree. And our response to that speech, no matter how pernicious, ought to reflect the beliefs of Dr. Martin King:

> I am convinced that if we succumb to the temptation to use violence in our struggle for freedom, unborn generations will be the recipients of a long and desolate night of bitterness, and our chief legacy to them will be a neverending reign of chaos.

Defendants are ordered to grant a permit to the plaintiffs for a rally at the Statehouse on January 15, 1994. The Court hereby declares that the state's October 26, 1993 bill to the plaintiffs for expenses and losses incurred in connection with plaintiffs' October 23, 1993 rally is void and unenforceable. Plaintiffs' claim for money damages is dismissed with prejudice. The costs of this action are assessed against the defendants.

It is so ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

DATE: January 4, 1994

PLAINTIFFS' EXHIBIT 33
TRANSCRIPT OF BROADCASTS BY
OHIO PUBLIC RADIO

Broadcast #5, November 18, 1993

Cohen: Officials in charge of the Capitol grounds say that they hate the Klan but there is nothing they can do to block the KKK in going ahead with plans to hold a January 15th rally protesting the Martin Luther King Holiday.

Finan: It's called the First Amendment rights of the United States Constitution.

Cohen: That is State Senator Richard Finan, head of the agency that controls the Statehouse grounds. After the KKK held a Statehouse rally in October which featured 500 police and highway patrol officers holding back a thousand anti-Klan protestors, officials sent the Klan several bills to pay for the extraordinary protection. They totalled more than a hundred thousand dollars. Klan leaders refused to pay and for a while state officials declared that meant the Klan would never get the okay to hold a second rally. Now, though, after meeting with their lawyer, officials, like Finan, are conceding they do not have court precedence on their side.

Finan: We would love to have a basis for denying the Klan the right to come here. We explored ideas of they didn't pay the bill. Does that give us any defense? Bottom line answer is "no."

Cohen: Reaction to the decision is fairly predictable. Ohio Klan leader Vince Pinette from Cleveland said he is delighted but not surprised.

Pinette: We knew that standing on that First Amendment, God given, inalienable, constitutional rights, that there would be no way they could put a price tag on free speech.

Cohen: And, on the other side, critics of the Klan are upset. Keith Gilty, who is an OSU professor, who helped organize the last protest against the Klan.

Gilty: I'm disappointed that the State is going to allow a group that advocates genocide to have public rallies on its grounds. If the Klan happened to be a group of so-called Palestinian terrorists or something of that sort, there's no way they would ever be granted a permit to speak in public. The problem here is that apparently Ohio state officials are not willing to acknowledge what the Klan really is.

Cohen: There is an ironic twist in this story. At the same time state officials were giving the green light to the Klan, they put up a red light to the traditional official state holiday tree and an unofficial Hanukkah menorah, both of which have graced the statehouse grounds for years. Senator Finan said he wanted to avoid having Columbus go through what Cincinnati went through last year and may go through again this year. Last holiday season, after a tree and menorah were put up in a public square in the queen city, the Klan went to court for ruling to allow them to erect a 15-foot tall cross. Vandals kept knocking it down so city officials were later ordered to provide special police protection at the Klan project. Senator Finan says this year no holiday symbols will be allowed at the Statehouse, and, that way, the Klan won't get its symbol in the door either. May seem strange that the Klan is

being allowed to hold a second rally while mainstream religious symbols are barred. Finan says the two situations are very different.

Finan: We could keep the Ku Klux Klan off the Statehouse grounds, all we have to do is bar everybody else. We're not prepared to do that. It's a little easier to bar a holiday tree than it is to bar everybody from the Statehouse.

Broadcast #6, November 19, 1993

Cohen: It was a dream come true for radio deejays and talk show hosts. An explosive issue every John and Joan Q. Public would want to gab about and offer their own views on. Capitol grounds managers announced that to prevent legal hassles over religious symbols in government buildings, they were barring the traditional holiday tree and Hanukkah menorah from the Statehouse. Media masters instantly hyped up the issue asking listeners to call in with their reactions. Some called the stations to protest on the air; others called state officials directly. The Governor's switchboard lit up like, you guessed it, a Christmas tree.

Governor's Secretary: Governor's Office . . . Oh, yes . . . You think it's terrible, well we do also . . . Yes, I agree with you and you think if we keep on we'll be eliminating Christianity and everything else . . . Yes, well I'll certainly pass that onto the Governor. We thank you for calling.

Cohen: One Columbus radio station took an informal poll of listeners. Ninety-one percent declared the State to

be the worst Scrooge in the world to ban the holiday symbols. Within hours Governor Voinovich and legislative leaders put together a letter to the Capitol Square Review and Advisory Board; the folks who voted for the ban. Not too subtle message. Call another meeting and reverse your ruling. Mike Dawson is a spokesman for the Governor.

Dawson: People of this great State think that we ought to have a Christmas tree and think that we ought to have a menorah at the Statehouse and so do we. We've had a Christmas tree at the Statehouse for tens of years and you can't let a single group or groups of people dictate to the people of Ohio what they are and aren't going to do.

Cohen: The Governor and legislative leaders don't agree with the Chairman of the Statehouse grounds agency. Senator Richard Finan had explained there was good reason for banning the mainstream religious symbols. He wanted to avoid the Statehouse to go through what Cincinnati went through last year. There, after a tree and menorah went up on Fountain Square, the Ku Klux Klan demanded and got the right to erect their own symbol – a 15-foot tall cross. Special police protection was eventually brought in to protect the cross from protestors who kept knocking it down. And in the end the taxpayers were the losers. Despite some fears that the Capitol may have to go through that same kind of hassle, Tuesday afternoon the Governor and legislative leaders may get their way. The Capitol Square Review Board has agreed to hold another session and, with three members present who were absent last time around, the board may reverse its original ruling. That could spark more disputes though, as the Board's spokesman Dan Shellenbarger notes, the Klan

might use the presence of a tree and menorah as the foot in the door to demand the giant cross.

Shellenbarger: In their other news releases that they have sent out, they said that they're out to embarrass Columbus, Ohio. We just figure we're under intense scrutiny.

Cohen: The squabble over the holiday tree and menorah has sparked national publicity. That's because the closing of the door on the holiday symbols happened the same day the Statehouse grounds opened the door to the Ku Klux Klan to hold another controversial rally at the Statehouse January 15th.

Broadcast #8, November 23, 1993

Cohen: With legislative leaders casting votes for the first time in this dispute, Capitol Square Review and Advisory Board has done a turnaround. That means the official state holiday tree and an unofficial giant Hanukkah menorah will be welcome at the Statehouse after all. Last week with three members absent, the Board had voted to bar all holiday decorations. Chair Richard Finan reasoned that closing the door on the tree and menorah would also close the door on possible plans by the Ku Klux Klan to demand the State erect a giant Klan cross as part of the Capitol display. That decision sparked dozens of phone calls from angry citizens and a terse letter from legislative leaders and the Governor. That's why the decorations ban lasted less than a week. Even Finan himself voted to drop the ban.

Finan: I've been in politics for twenty one years. When you get a letter from the Governor, the Speaker, and the President of the Senate, you do respond.

Cohen: Finan said public outrage and pressure from the Governor wasn't the only factor. He said lawyers from Ohio's Attorney General's office advised that keeping the decorations banned could cause serious constitutional questions, but pressed to explain further, Finan refused.

Finan: I think that's all speculation, Bill; I think in the instance that we're in, we have to choose our words very carefully as to what we do and what we say.

Cohen: While Finan wouldn't discuss the legal arguments, a top legal advisor to the Attorney General did. Richard Cordray explained that banning the holiday tree and menorah could be considered a violation of citizens' free speech rights and he hinted that someone could file a court suit over it.

Cordray: In Ohio, the tradition has been that we permit holiday season displays on the Capitol Square, and, under the First Amendment, if the government establishes a tradition of permitting people to speak in a certain way, then to revoke that permission, and to stop a tradition without a compelling reason, involves you in a possible violation of the First Amendment, and no one wanted a constitutional violation here which could cost the taxpayers a lot of money.

Cohen: While the Statehouse grounds agency decided the decorations issue, another continued to simmer. The Board recently declared it could find no legal basis for blocking the Ku Klux Klan holding another Statehouse

rally in January, even though the group refused to pay more than a hundred thousand dollars in security expenses from its October rally. That ruling brought a protest from State Representative Otto Beatty who said courts have ruled it's okay to balance people's free speech rights with public safety concerns.

Beatty: We're talking about the kind of hate and rhetoric that we saw when they were down here before. That is enough to incite feelings of ill will, feelings of hate, and perhaps cause physical confrontations between people. So with that kind of balancing act I think that they have the legal right to at least consider not issuing the permit.

Cohen: The Klan rally is scheduled for January 15th, Martin Luther King's birthday.

DEFENDANTS' EXHIBIT C

[*Reproduced from Newspaper Article*]

The Columbus Dispatch
Thursday, November 20, 1993

Klan leader says group will seek to erect cross

By Alan Johnson
Dispatch Statehouse Reporter

The Ku Klux Klan had no plans to place a Klan cross at the Statehouse – until recent action by the Capitol Square Review and Advisory Board.

The board on Tuesday agreed to allow a Christmas tree and Menorah holiday display at the Statehouse, less than a week after refusing them.

Vince Pinette, grand titan of the Knights of the Ku Klux Klan, said the group now plans to seek permission to place a cross at the Statehouse.

The initial ban on holiday displays, Pinette said, "to us was almost an attack on Christianity and that kind of offended us.

"The Klan doesn't have a problem with a Christmas tree," he said. "But we feel if the Jews are going to have a menorah, we should put up a symbol for our lord, Jesus Christ."

Board officials said they have not received a Klan request for a display.

A Klan cross displayed on Fountain Square in Cincinnati last year sparked violence and vandalism. Because of that, the board initially banned the Christmas tree and menorah so it also could ban a Klan cross and avoid security problems.

Pinette, a Cleveland tool and die worker, said the Klan has applied for – and is confident it will get – a permit for a Statehouse rally on Jan. 15, two days before Martin Luther King Jr. Day. He said the Klan will not ask for security and he is not worried about violence.

DEFENDANTS' EXHIBIT D

[Reproduced from Newspaper Article]

The Columbus Dispatch
Saturday, November 20, 1993, Page A1

HOLIDAY DISPLAY DISPUTE

Statehouse may yet see Christmas tree, menorah

By Alan Johnson
Dispatch Statehouse Reporter

A Christmas tree and a menorah – but not a Ku Klux Klan cross – may go up at the Statehouse after all.

The Capitol Square Review and Advisory Board, pummeled by criticism and pressured by the governor and the legislature's four leaders, will meet Tuesday to reconsider whether to allow the traditional Christmas tree and a menorah on the Statehouse grounds.

The board, which oversees the Statehouse, Senate Building and grounds, voted 4-2 Thursday to ban the tree and menorah. It was concerned that allowing such symbols would prompt groups such as the Ku Klux Klan to erect displays.

The board was asked yesterday to reconsider. The request came from Gov. George V. Voinovich; House Speaker Vernal G. Riffe Jr., D-Wheelersburg; Senate President Stanley J. Aronoff, R-Cincinnati; House Minority Leader Jo Ann Davidson, R-Reynoldsburg; and Senate Minority Leader Robert J. Boggs, D-Jefferson.

There appears to be little doubt the vote will be reversed. Riffe, Davidson and Boggs are board members but did not vote Thursday for various reasons.

"While we recognize the board's concerns, we strongly believe the tree and the menorah should be displayed as they have been in the past," the officials said in a letter they all signed.

"The board's initial decision to not have the traditional holiday displays was a mistake. I trust this matter will be resolved quickly," Voinovich said in a statement.

The governor was reported to be "disappointed and upset" when he learned about the decision. He was attending a Republican Governors' Association conference in Phoenix, Ariz.

If the board reverses itself, the Christmas tree will go up, as planned, inside the atrium connecting the Statehouse and Senate Building. A tree lighting had been scheduled for Dec. 7.

The menorah has been raised on the Statehouse lawn since 1987 in celebration of Hanukkah, which this year begins Dec. 9.

"We are taking the governor's comments very seriously," said Dan Schellenbarger, the board's spokesman. "The board is reconvening in light of those comments and the overwhelming public response about the decision. We've received hundreds of calls from people opposing the board's decision. I don't know of anybody who supported it."

Shellenbarger said he expects the board to allow the Christmas tree and menorah by defining them as secular

holiday symbols. A cross from the KKK or any organization could be seen as a religious symbol that violates the constitutional separation of church and state.

Grand Titan Vince Pinette of the Ohio Knights of the Ku Klux Klan was out of town yesterday and could not be reached for comment, his wife said.

A federal court ruling last year permitted the Klan to erect a cross on Fountain Square in Cincinnati during the holiday season. The cross brought protests and vandalism.

Word of the possible state reversal on the holiday tree was good news to Rolland Allman of Grove City, who had donated a 25-year-old, 20-foot blue spruce from his yard for use at the Statehouse.

"It was something I wanted to them [sic] have." Allman said. "It's getting kind of big for the front yard.

"I hope they go ahead with it."

Asked about the KKK and constitutional issues, Allman said, "I'm not worried about it."

The American Civil Liberties Union has no problems with the holiday religious displays as long as the church-state separation is respected, said Susan Rusnak of the ACLU in Cleveland.

Rusnak said a 1989 U.S. Supreme Court decision in a Pittsburgh case found that a Christmas tree and menorah display at city-county building represented the winter holiday season, "which has attained a secular status in our society."

But a cross, Rusnak said, "is unequivocally an institution of the Christian faith. There's no mistaking when you see a cross."

Rusnak said that if the matter comes down to a question of freedom of expression, "the ACLU would favor more freedom of expression. If the Capitol grounds would have a Christmas tree, a menorah and a cross, that would be a victory for freedom of expression."

FIRST CANDLE IS LIGHTED

Tim Revell/ *Dispatch*

Gov. George V. Voinovich lights the menorah at the Statehouse with help from several children. David Schottenstein, 10, had the honor of flipping the switch at yesterday's ceremony. The Jewish celebration of Hanukkah began at sundown.

PLAINTIFFS' SUPPLEMENTAL EXHIBIT 102

[*Reproduced from Newspaper Article*]

The Columbus Dispatch
Thursday, December 23, 1993, Page A1

More crosses going up

Church groups plan to overwhelm Klan display
By Sylvia Brooks
and Randall Edwards
Dispatch Staff Reporters

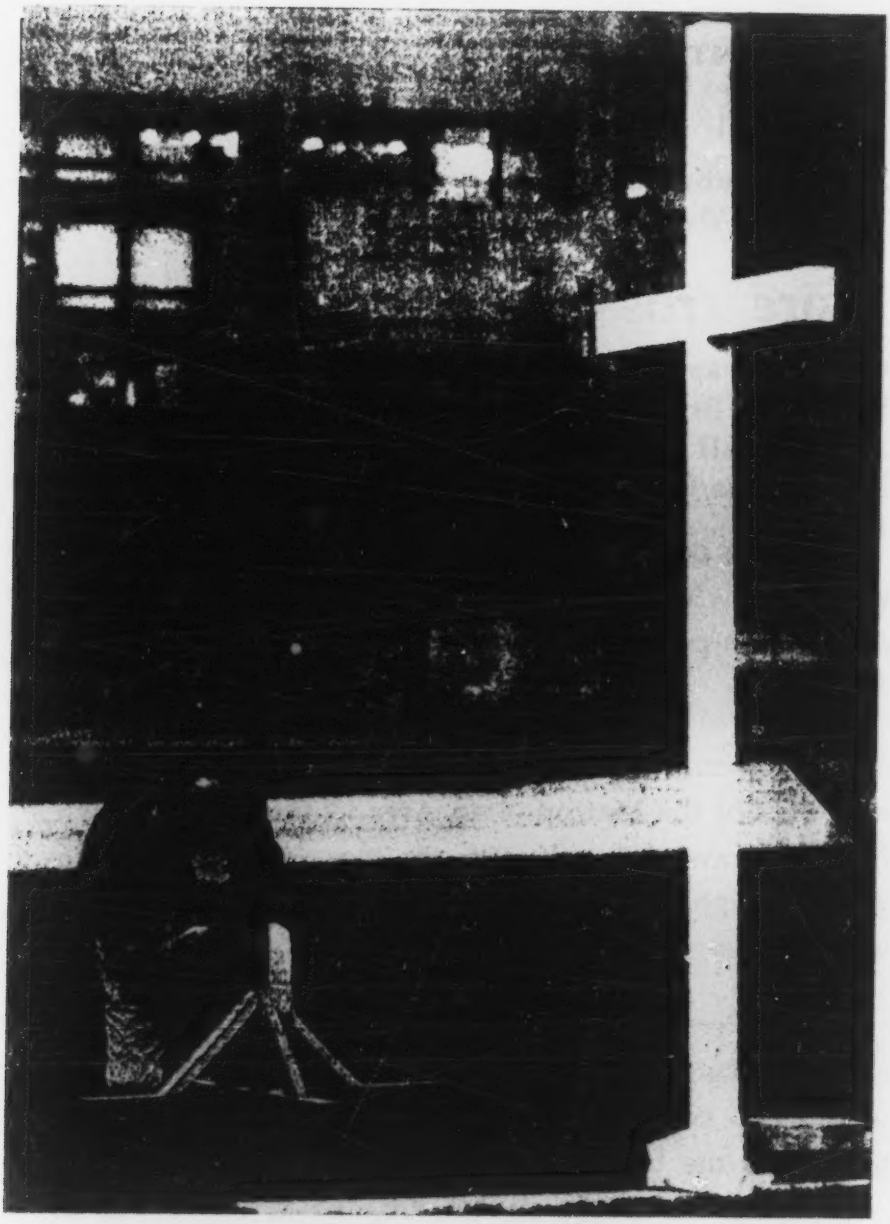
Dozens of crosses made by local churches may spring up on the Statehouse lawn after the state yesterday approved a permit for members of a local church organization.

The permit was sought by staff and some board members of the Metropolitan Area Church Council, who hope to draw attention from the cross erected yesterday by the Knights of the Ku Klux Klan by overwhelming it with crosses from churches.

Protesters battered the Klan cross – at one point last night stuffing it upside down into a Statehouse lawn trash can – while lawyers continued a legal battle likely to lead to the U.S. Supreme Court.

Burton Cantrell, an administrator of the council, said all churches in the Columbus area will be invited to erect crosses to "overcome the Klan with our good will at the Christmas season."

RA25



Tim Revell/*Dispatch*

Roger Evans prays at the cross he set up near the Ku Klux Klan cross on the Statehouse lawn. Evans is with the Southside Mission Project. Other churches and organizations also may erect crosses.

The Capitol Square Review and Advisory Board granted a blanket permission for all churches friendly to or affiliated with the church council to erect crosses.

Ron Keller, executive directed of the state board, said the state approved the permit in response to a federal court order.

The Rev. Tom York of the Broad Street Presbyterian Church and the Rev. Ross Crabtree of Boulevard Presbyterian Church say they will erect crosses, too.

Officials of the United Methodist Church were calling 120 churches around Columbus asking them to participate, said Karen Shepler, director of Urban Ministries for the West Ohio Conference of the United Methodist Church.

The permit for the churches runs through Dec. 27. The Klan permit runs through Christmas Eve, says a federal judge's order.

Klan members who erected the cross said they were being unfairly attacked by the state.

"We feel this is a shame. We want *our* freedom of expression, and we want to bring a message of hope," said Vince Pinette, who is known as the "grand titan" of the Knights of the Ku Klux Klan in Ohio.

"We are not a hate organization. Other minorities have organizations which represent them. This is the only organization in America that represents white people."

The debate has turned to a Klan rally planned next month on the Martin Luther King holiday. "I'm asking all of the people to come out on Jan. 15 and speak against

hatred," said Harry Edney, a spokesman for the Ordinary People's Movement, a Columbus-based group that organized a protest against the Klan's October rally.

The January rally was proposed after state official sent the Klan a $15,000 bill to cover the costs of protective fencing and other security measures at the Oct. 21 rally at the Statehouse.

Klan organizers said they would not pay the bill and would retaliate by scheduling another rally on the King holiday.

When state officials did not issue a permit for the January rally and denied the cross permit, the Klan filed suit in U.S. District Court in Columbus, saying its constitutional rights of free expression and assembly had been harmed.

Judge James L. Graham ruled Tuesday that the state must allow the cross because it was privately funded and was in a traditional "public forum." The order was upheld by the 6th U.S. Circuit Court in Cincinnati. Richard Cordray of Ohio Attorney General Lee Fisher's office said he would appeal to the U.S. Supreme Court.

Graham set a Jan. 3 date to hear arguments on the other issues in the lawsuit.

PLAINTIFFS' SUPPLEMENTAL EXHIBIT 103

[Reproduced from Newspaper Article]

The [Akron] Beacon Journal
Thursday, December 23, 1993, Page B5

Klan cross goes up, down

• Opponents topple Statehouse display three times, Churches' crosses take its place

Associated Press

COLUMBUS: A Ku Klux Klan cross erected outside the Statehouse took a beating from Klan opponents and finally was removed Wednesday. Later, crosses from church groups took its place on the Capitol lawn.

A man was seen taking the Klan's cross Wednesday night. The State Highway Patrol referred calls to a spokesman, who was unavailable.

The Metropolitan Area Church Council placed seven crosses where the wooden Klan cross had stood on the southwest corner of the Statehouse lawn. The Capitol Square Review and Advisory Board granted the council a permit Wednesday.

"Our secret desire is to make the Klan cross less significant by surrounding it with dozens of identical crosses," said the Rev. Burton Cantrell, council director. "We're saying to the Klan, you don't speak for Ohio, you don't speak for Columbus."

Associated Press

Opponents and supporters of the Ku Klux Klan's cross struggle against each other at the Statehouse on Wednesday. Said one opponent, "We're saying to the Klan, you don't speak for Ohio, you don't speak for Columbus."

In Cincinnati, where a different Klan group put up a cross on Fountain Square early Monday, the day passed without incident.

This is the third year for a Klan cross in Cincinnati. Ten people were cited for toppling last year's, but this one has been mostly ignored.

Cantrell paid a $20 permit fee and agreed to post a $225 bond if Statehouse property is damaged.

State officials, whose effort to block the Klan cross was overturned Tuesday by a federal judge, cited the decision in granting the church council's permit.

The 10-foot Klan cross was erected about 12:30 a.m. Wednesday. It was toppled by Klan foes three times by noon.

RA31

PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 105

Society Bank
Society
BANK ONE
PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 106

Supreme Court, U.S.
FILED
DEC 1 1994
OFFICE OF THE CLERK

No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,
Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Did the court below err in holding that the State must allow a private group to erect a large, unattended Latin cross directly in front of the Ohio Statehouse, on the ground that a private organization's display of a religious symbol in a public forum, even a public forum closely associated with the seat of government, can never violate the Establishment Clause?

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Ronald Smothers, *School Prayer Gaining Ground in South*,
N.Y. Times, Feb. 22, 1994, at A12 9

INTRODUCTION

Respondents' opposition to the certiorari petition is chiefly devoted to an unpersuasive attempt to recharacterize the single disputed legal issue in this case. It thus stands in contrast to the decisions below by the District Court and the Court of Appeals, both of which explicitly addressed and resolved the troubling question presented here between the conflicting dictates of the Establishment Clause and the Free Speech Clause. For purposes of this reply, however, it is most important first to underscore the significant areas of apparent agreement between the parties, before turning to address Respondents' attempted recharacterization of the central legal issue in this case.

I. THE QUESTION OF WHETHER PRIVATE RELIGIOUS DISPLAYS IN A PUBLIC FORUM CLOSELY ASSOCIATED WITH THE SEAT OF GOVERNMENT CAN EVER VIOLATE THE ESTABLISHMENT CLAUSE DIVIDES THE CIRCUITS AND REMAINS UNRESOLVED, AND THE COURT HAS PREVIOUSLY RECOGNIZED THAT IT IS WORTHY OF PLENARY REVIEW.

First, Respondents do not dispute -- for it is indisputable -- that a sharp split exists among the Federal Circuit Courts of Appeals on the sole issue presented in this case: whether an unattended religious display erected by a private group in a public forum closely associated with the seat of government can ever violate the Establishment Clause. On the one hand, the Sixth Circuit is aligned with the Eleventh Circuit and, to some extent, the Seventh Circuit in holding that such displays cannot violate the Establishment Clause. *See Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 676 (6th Cir. 1994); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc);

Americans United for Separation of Church & State v. Grand Rapids, 980 F.2d 1538 (6th Cir. 1993) (en banc); *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc); *but cf. Gonzales v. North Township*, 4 F.3d 1412 (7th Cir. 1993). On the other hand, the Second and Fourth Circuits have held that such displays can and do violate the Establishment Clause. *See Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F.2d 109 (2nd Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992); *Smith v. Albemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990). *See* Pet. 18-24. The core positions of these courts are unaffected by the immaterial factual distinctions that Respondents have suggested in their opposition.[1] A writ of certiorari should issue here to consider and resolve this deep and persistent circuit conflict.[2]

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[1] At one point, Respondents suggest that this case may be distinct from *Kaplan* and *Smith* because here Petitioners have permitted other unattended displays in the public forum. Opp. 17-18. The same was true, however, of the public fora in *Kaplan*, 891 F.2d at 1033 (Meskill, J., dissenting), and in *Smith*, 895 F.2d at 955. Indeed, this is the very nature of any true public forum, which alone is where this issue has been posed. Moreover, in *Kaplan* the court expressly held that it is irrelevant for purposes of the Establishment Clause whether other religious symbols are or have been displayed in the public forum at issue, *see* 891 F.2d at 1029, a statement that occurs immediately following the language quoted by Respondents in their opposition.

[2] As detailed in the Petition for Certiorari, the specific circuit conflict identified here, and at issue in this case, did not surface again, in the wake of *McCreary*, until *after* the Court declined review in the two *Burlington* cases and the *Albemarle County* case. It was identified and exacerbated by the Sixth Circuit's pointed criticism of those decisions in *Americans United*, and has since been reinforced by the Eleventh Circuit's contrary decision in *Miller* and now the decision of the court below in this case. In none of these later cases, until this one, has review been sought from this Court. *See also* Pet. 23 n.7 (explaining why the

Second, Respondents do not question -- and there is no question -- that the Court has recognized that this issue remains an open one. The Court has recognized that the issue of whether an unattended religious display in a location closely associated with the seat of government could violate the Establishment Clause has not yet been resolved either by the "seasonal display" line of cases, such as *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), or by the "public access" line of cases, such as *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). *See County of Allegheny*, 492 U.S. at 600 n.50.[3] Moreover, Respondents do not deny that the issue has remained open since *County of Allegheny* and has not yet been settled, either expressly or implicitly, by the Court.

Third, Respondents do not, in any way, contest the rectitude of the Court's previous determination that this fundamental constitutional issue is of recurring significance and national importance, and thus constitutes "an important question of federal law which has not been, but should be, settled by this Court." S. Ct. R. 10.1(c). The Court granted certiorari on this very issue in *McCreary v. Stone*, 739 F.2d 716 (2nd Cir. 1984), *aff'd mem.*, 471 U.S. 83 (1985). *See Board of Trustees v. McCreary*, 53 U.S.L.W. 3273 (U.S. 1984). In the end, however, the Court was unable to resolve the issue authoritatively because it was equally divided and

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Ninth Circuit's decision in *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 690 (1994), did not pose the same conflict because there the court correctly distinguished *Kaplan* and *Smith* on their different facts).

[3] Indeed, as noted in the Petition for Certiorari, the Second Circuit in *Kaplan* has understood this Court's decision in *County of Allegheny* as lending further support for the position it has taken in square disagreement with the decision below in this case. *See* Pet. 20 n.5.

thus issued no decision on the merits. *See Board of Trustees v. McCreary*, 471 U.S. 83 (1985). *See also County of Allegheny*, 492 U.S. at 600 n.50. The instant case offers the Court an excellent opportunity cleanly to address and resolve this longstanding issue about the proper relationship between the conflicting dictates of the Establishment Clause and of the Free Speech Clause, in the particular context of unattended religious displays located in a public forum.

II. RESPONDENTS' CLAIM THAT THIS CASE SHOULD TURN ON ISSUES OF POLITICAL DISCRIMINATION REQUIRING RESOLUTION UNDER THE EQUAL PROTECTION CLAUSE IS A MISCHARACTERIZATION THAT DID NOT PROVIDE THE BASIS FOR DECISION IN ANY OF THE PROCEEDINGS BELOW.

In their opposition, Respondents have sought to recast this case as raising issues quite distinct from those expressly presented, considered, and resolved in any of the proceedings below. The administrative hearing examiner held: "relevant federal case law indicates that displays of menorahs and other symbols having both secular and sectarian significance during the holiday season do not run afoul of the Constitution, while displays of the Latin cross, which has a uniquely sectarian purpose, does violate the establishment clause." Pet. A36. The District Court disagreed with this determination and, relying on the *Americans United* decision, stated as its ground for decision that the application here came "from a private party to erect a religious symbol in what is a traditional public forum. In light of these facts, it is difficult to conclude that permitting this display would constitute government endorsement of religion" in violation of the Establishment Clause. Pet. A24. Similarly, the Court of Appeals expressly concluded that the very same points were determinative of this case: "Because Capitol Square is a

public forum and the Klan's display of a Latin cross is private speech, a reasonable observer could not perceive the display at issue to be a government endorsement of religion. Therefore, we hold that the display does not violate the Establishment Clause and we affirm." Pet. A2. In light of these plain holdings, Respondents' efforts to recast this matter instead as a political discrimination case are simply unavailing and unpersuasive.[4]

Respondents try to bolster their recharacterization of the legal issue in this case by arguing that their display of the Latin cross directly in front of the Ohio Statehouse carries political overtones in addition to the core religious message of the display. As an initial matter, this claim belies Respondents' own uncontroverted testimony of their purpose in seeking to erect this religious display as "a symbol for our Lord, Jesus Christ" in furtherance of their more general purpose to "establish a Christian government in America." Tr. of Dec. 20, 1993 Hearing at 101-02; *id.* at 53-55.

More generally, Petitioners do not dispute that the kinds of religious displays at issue in this case and the other cases cited above also carry political overtones. Indeed, it is obvious that the hotly contested issues raised in this country about the proper contours of the constitutional separation of church and state have always carried far-reaching political overtones. That is why they are addressed in a fundamental provision of our foundational political document -- the First Amendment to the United States

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[4] The sole passage in which any of the courts below even mentioned the Equal Protection Clause, in passing, was a quotation by the court below from this Court's decision in *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972), a labor-picketing case. That quotation, which appears in the court's peroration, did not provide the legal ground for decision in either the District Court or the Court of Appeals.

Constitution. But these observations do not change the single and central issue in this case, which is how to strike the proper constitutional balance between the Establishment Clause and the Free Speech Clause in judging the propriety of private religious displays located in a public forum.

Respondents also claim that this case is different because Petitioners have allowed a menorah to be displayed in front of the Ohio Statehouse for several years in conjunction with a Christmas tree. They completely ignore, however, the fact that this Court's square holding in *County of Allegheny* compels the State of Ohio to permit the display of a menorah in this setting, in part because the menorah has both religious and secular significance when it is displayed for the Chanukah holiday season. *See, e.g.*, 492 U.S. at 618 n.68; *see also id.* at 665 (Kennedy, J., concurring and dissenting). Yet several Justices in *County of Allegheny* expressed grave doubts about the propriety of any religious display of a cross -- which is not so associated with the holiday season -- in the very same setting. *See id.* at 629-30 (O'Connor, J., concurring); *id.* at 661 (Kennedy, J., concurring and dissenting).[5]

Respondents also fail to mention that they specifically amended their complaint to jettison their original request to have their display of the Latin cross included "as part of the 1993 holiday seasonal display on the Statehouse grounds" and instead sought to have their display erected on its own at

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[5] This is presumably because, as the Seventh Circuit has summarized: "we are masters of the obvious, and know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross." *Gonzales*, 4 F.3d at 1418; *see also American Civil Liberties Union v. St. Charles*, 794 F.2d 265, 271-72 (7th Cir.) (display of Latin cross "unmistakably signifies Christianity," "is not a traditional Christmas symbol," and is "not only religious but also sectarian") (Posner, J.), *cert. denied*, 479 U.S. 961 (1986).

that location. *Compare* Complaint at 1-2, 9 *with* Verified & Amended Complaint at 1-2, 9.[6] The ultimate point, however, is that the single issue for decision here is whether the government's sanction of Respondents' display of a large, unattended Latin cross directly in front of the Ohio Statehouse is required by the Free Speech Clause or would instead be in violation of the Establishment Clause. That is the issue properly presented to the Court on the decisions below in this case, rather than any repositioning of this case manufactured by Respondents in an evident attempt to evade review by this Court of the merits of those decisions.

Finally, Respondents contend that Petitioners here did not seek to associate themselves with Respondents' religious display. They thus implicitly point to an observation made by Justice Stevens in his earlier stay order in this case, where he noted that on the facts of this case the State may have "effectively disassociated itself from the display" by denying Respondents' application for permit and defending that denial in this litigation. Pet. A38-A39.

As an initial matter, it would make no sense to have cases like this one turn on whether the government has opposed an application for a display. In essence, then, the courts would be fashioning a test that would instruct the government that the more it opposed a particular display, the

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[6] Respondents also refer tangentially to a disclaimer sign that appeared with their religious display; they neglect to mention, however, that the purported "disclaimer" was a small cardboard sign that buckled immediately in the wind and was essentially indecipherable to any ordinary passerby. *See* Pet. App. A43 (photograph). *Cf. Gonzales*, 4 F.3d at 1423, 1414 (explanatory plaque that was obscured from view and later lost properly bears no weight in the analysis). Moreover, the Court has held that such a disclaimer is simply inadequate to immunize any truly or inherently religious display against an Establishment Clause challenge. *See, e.g., Stone v. Graham*, 449 U.S. 39, 41 (1980).

more likely it would be ultimately required to permit the display. Conversely, the more the government was willing to acquiesce in granting displays based on prior court rulings, the more likely it would be found to be obliged to prohibit the display if its actions were later challenged by any third party. Rather than presenting a workable approach to resolving such cases, therefore, any such emphasis would only encourage government officials to engage in conduct best described as self-defeating intransigence.

No finding of fact, however, was ever made on this point, and even more importantly, this point was never mentioned in the more sweeping decision rendered by the court below, and formed no part of its holding: "In a public forum, the religious content of private speech is absolutely irrelevant for First Amendment purposes." Pet. A12. As the Second Circuit has noted, the intractable problem posed by this approach is that under it, clearly, "the public forum doctrine would swallow up the Establishment Clause." *Kaplan*, 891 F.2d at 1029. A writ of certiorari is warranted in this case for the Court to consider whether any such categorical test is mandated by the conflicting dictates of the First Amendment.

III. THE "PUBLIC FORUM" ISSUE PRESENTED IN THIS CASE IS DISTINCT FROM THE ISSUE PRESENTED IN *ROSENBERGER V. RECTOR AND VISITORS OF UNIV. OF VA.* AND THUS THE COURT SHOULD DECIDE THIS CASE INDEPENDENTLY OF *ROSENBERGER*.

The Court granted certiorari on October 31, 1994 in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 18 F.3d 269 (4th Cir. 1994), *cert. granted*, 63 U.S.L.W. 3346 (U.S. Nov. 1, 1994) (No. 94-329), to address a distinct issue also presenting a collision between the dictates of the

Establishment Clause and the Free Speech Clause. In *Rosenberger*, the specific issue is whether a public university may exclude a religious magazine from funding that is made available to various other publications. The Fourth Circuit held that the funding restriction did not violate the Free Speech and Free Press Clauses, in part because the university had a compelling state interest in avoiding a probable violation of the Establishment Clause. *Id.* The Fourth Circuit expressly noted, however, that the case did not involve any public forum issues. *See id.* at 287. Thus *Rosenberger* does not bear directly on the instant case, and should not be seen as either directly or indirectly resolving the issue presented herein.

Nonetheless, the instant case would serve as an appropriate companion case to *Rosenberger* for the Court to analyze some of the possible broader ramifications of the so-called "equal access" line of cases, such as *Widmar v. Vincent*, 454 U.S. 263 (1981).[7] The Fourth Circuit in *Rosenberger* distinguished *Widmar* on the ground that subsidizing a religious publication the same as other publications "inevitably would advance [the religious magazine's] Christian mission" and would "send an

---

[7] Those ramifications are being felt in other significant areas as well. On the issue of school prayer, for example, the lower federal courts are citing the Court's "equal access" decisions to uphold ostensibly "voluntary" prayer in school settings, under the Free Speech Clause as pitted against the Establishment Clause, when such prayer is student-initiated and student-led. *See, e.g., Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1950 (1993); *Adler v. Duval County School Bd.*, 851 F. Supp. 446 (M.D. Fla. 1994). *See also* Ronald Smothers, *School Prayer Gaining Ground in South*, N.Y. Times, Feb. 22, 1994, at A12 ("Measures moving through the legislatures in Mississippi, Florida, Louisiana, South Carolina, and Virginia take the approach that the issue is one of students' rights to free speech, rather than a question of religious rights.").

unmistakably clear signal that the University of Virginia supports Christian values and wishes to promote the wide promulgation of such values." *Rosenberger*, 18 F.3d at 286. Similarly, government sanction of a private group's desire to erect a large, unattended Latin cross directly in front of the Ohio Statehouse is properly distinguished from *Widmar* on the same basis: the State would be sending a signal of endorsement of a particular sectarian belief. Thus, the Court should reverse the ruling below and not require the State to be placed in a position that "emphasize[s] sincere and deeply felt differences among individuals." *County of Allegheny*, 492 U.S. at 651 (Stevens, J., concurring and dissenting).

CONCLUSION

For these reasons, as well as those set out at more length in the initial petition, a writ of certiorari should be granted in this case.

Respectfully submitted,

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December 1, 1994

Supreme Court, U.S.
FILED
NOV 22 1994
OFFICE OF THE CLERK

No. 94-780

IN THE

Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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OTHER AUTHORITIES

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Patterns of American Nativism,
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INTEREST OF THE *AMICI*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of Jews. It has filed numerous briefs *amicus curiae* in cases involving the Establishment Clause. In recent years it has had numerous occasions to address the relationship between the Establishment Clause and the public forum doctrine, the very issue presented here.

* * *

The National Jewish Community Relations Advisory Council (NJCRAC) is an umbrella organization including the following national member organizations: American Jewish Committee, American Jewish Congress, Anti-Defamation League, B'nai B'rith, Hadassah, Jewish War Veterans of the United States of America, Jewish Labor Committee, National Council of Jewish Women, Union of

American Hebrew Congregations, United Synagogue of Conservative Judaism, Women's League for Conservative Judaism, Women's American ORT; as well as 117 community member agencies representing all major Jewish communities in the United States.

As the national planning and coordinating body for the field of Jewish community relations, dedicated to preserving the principles embodied in the Bill of Rights, NJCRAC believes that the separation of church and state is an essential bulwark in maintaining the individual, group, and political equality of all Americans. (The Union of Orthodox Jewish Congregations of America, a NJCRAC member agency, does not join in this brief because it has not taken a position on the issues raised by this case).

The brief is filed with the consent of the parties.

STATEMENT OF THE CASE AND FACTS

The *amicus* adopts the statements of the case and the facts of the Petitioner.

ARGUMENT

The Petition for Certiorari adequately demonstrates that a full-fledged conflict exists between the Second[1] and Fourth Circuits,[2] on the one hand, and the Sixth[3] and Eleventh Circuits[4] on the other, whether free-standing, privately owned, religious symbols placed in public forums can in any circumstances be seen as reflecting state approval so as to unconstitutionally establish religion.

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1. *Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989).

2. *Smith v. Lindstrom*, 895 F.2d 953 (4th Cir. 1990).

3. *Americans United v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc).

4. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc).

The Sixth and Eleventh Circuits worry that to allow Establishment Clause concerns to justify exclusion of religious speech from a public forum is to allow the Establishment Clause to swallow up the Free Speech Clause. The Second Circuit, by contrast, fears that a blanket rule permitting free-standing religious symbols in all public forums allows the Free Speech Clause to swallow up the Establishment Clause.

The inter-circuit conflict turns in part on the question of whether reasonable persons would view a free-standing religious symbol in a public forum at the seat of government as representing the point-of-view of the state. But also lurking in this case is the question of whether equality of treatment of religious speech with secular speech should be the overriding theme in deciding these cases, or whether the Establishment Clause's prohibition of government support for religious speech requires that free-standing religious symbols be treated in some

circumstances as the state's speech. Cf. *Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981)

The Second and Fourth Circuits hold that the principle of non-discrimination in a public forum and the demand of the Establishment Clause that government not be seen as endorsing religious speech are to be reconciled by weighing all of the facts and circumstances in a particular case to determine which constitutional policy is more directly implicated.

Those courts distinguish between a public forum at the seat of government and those located in public parks, reasoning that in the former, but not the latter, the reasonable observer could apprehend government endorsement of the religious message in the display of a free-standing symbol.[5] The *amicus* believes that this is

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5. Although Petitioners do not cite it, the Seventh Circuit seems to follow the Second and Fourth Circuit rule, thus compounding the conflict. Compare *AJCongress v. City of Chicago*, 827 F.2d 120 (continued...)

the only approach which gives due weight to both of the constitutional principles at stake.

The Eleventh Circuit, and the Sixth, reject this case-by-case approach and instead enforce a black-letter rule that private religious speech in a public forum cannot establish religion because it is in fact the speech of private parties not subject to the Establishment Clause. Although this view allows one constitutional provision to sweep away another, it does have the advantages (and disadvantages) of a black-letter rule.

As Petitioners point out, the importance of the issue – and its difficulty – is adequately demonstrated by the grant of certiorari in *Bd. of Trustees v. McCreary*, 53 U.S.L.W. 3273 (1984) and the resulting equally divided

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5.(...continued)

(7th Cir. 1987) with *Mather v. City of Mundelein*, 864 F.2d 1291 (7th Cir. 1989) and *Doe v. Small*, 964 F.2d 611 (7th Cir. 1992) (en banc). Cf. *Kreisner v. City of San Diego*, 1 F.3d 775 (9th Cir. 1993)

Court. It is, as Petitioners again point out, further demonstrated by this Court's reservation of the issue in *County of Allegheny v. ACLU*, 492 U.S. 573, 600 n.50 (1989).

The conflict of circuits is not just theoretical. It has widespread practical implications. The annual experience of *amicus* in advising public officials and Jewish communities throughout the country at holiday time concerning free-standing religious symbols placed at the seat of government indicates widespread confusion as to the correct rule of law in this area. This is true not only in those circuits which have not decided the issue, but even within circuits which have come to some conclusion, because of continued uncertainty over which circuit's rule will ultimately prevail in this Court.

The relationship between religious speech in a public forum and whether the existence of such a forum is

inevitably sufficient to dispel any suggestion of state speech is not limited to free-standing religious symbols. The question of whether the existence of a designated public forum dispels all Establishment Clause concerns has arisen in the public school context as well. Thus, school districts have argued that if they designate graduation as a public forum (open only to one speaker chosen by students) a majority of students may choose to allow one of their number to offer a prayer without violating *Lee v. Weisman*, 112 S.Ct. 2649 (1992). See, e.g., *Adler v. Duval County School Bd.* 851 F.Supp. 446 (MD Fla. 1994).

Leaving aside the question of whether a public forum exists at high school graduation, the argument that the existence of a public forum mechanically defeats an Establishment Clause claim made in those cases is identical with the Respondent's claim here. A decision in

this case, then, would do much to bring order to the entire area of Establishment Clause and Free Speech law.

Nor are the dozens of annual disputes over free-standing displays (or supposed public forums in public schools) ordinary political disputes. When wholly religious symbols are displayed at the seat of government for purely religious reasons, they engender debates which are typically bitter and always divisive. They are frequently marred by charges and counter-charges of religious intolerance.

Some of this will linger even if this Court were to accept this case for review and determine the legal issues decisively. But the harm engendered by these legally open-ended disputes is compounded many-fold by the inability of local public officials to invoke a clear and unambiguous ruling of this Court. A decision by this Court in this case would have the welcome impact of minimizing disputes over free-standing religious symbols

at the seat of government, and of containing the harm to the social fabric caused by those disputes.

Moreover, as the facts of this case illustrate, religious symbols can be used for sending messages overlaid with heavy political significance. Citizens have the undoubted right to invest religious symbols with political meaning. It is, however, to blink reality to deny that such usage imposes great costs on the government which is made an unwilling host to such usages.

The display of a free-standing cross by the Ku Klux Klan at the Statehouse of Ohio surely is understood by Jews, Catholics and Blacks, and, perhaps, women, in ways far different from the antiseptic conclusion of the Sixth Circuit that only wielders of an "ignoramus' veto" [A-9], could object to a free standing Klan display on the Statehouse grounds.

The Klan has a sordid history in Ohio. J. Higham, Strangers In the Land: Patterns of American Nativism,

1860-1925 (1992 ed.) at 297-99. At times in Ohio's past, the Klan enjoyed at least the tacit approval of state government. For citizens of Ohio who are the traditional targets of Klan bigotry and violence – often celebrated with the burning of a cross such as the one the court below has ordered displayed at the Ohio Capitol – the cross' display means something far different than it did for judges of the Court of Appeals. Citizens understandably demand to know why public officials are allowing that symbol to appear once again on the grounds of the Capitol.

The Klan has the undoubted right to spread its poisonous ideology. Equally, the State of Ohio has at least the right, and perhaps the constitutional duty, to refrain from itself adopting those views. Where the Klan itself is clearly identified as the speaker, as when a live Klansman speaks on the Ohio Capitol grounds, the State may not act to silence the speaker because it disagrees

with his or her point of view. No one could reasonably confuse the State and the speaker.

The question presented by this case is whether a free-standing symbol at a seat of government is understood as purely private speech by reasonable bystanders, including those too far away to read the flimsy paper disclaimer tacked to the bottom of the cross [A-43], or whether, because it stands alone at the seat of government, where many citizens no doubt believe the State has unfettered discretion to decide what may be erected, it should, or at least, can, be treated for constitutional purposes as governmental speech.

If this Court decides that the Klan's right to speak encompasses the right to erect free-standing crosses at state Capitols, so be it. Citizens will learn that this is one of the heavier prices they pay for freedom. But because the issue is so important and so difficult this Court should decide it.

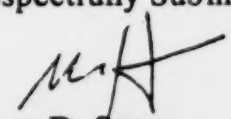
II

Paradoxically, the impact of the uncertainty of the law in this area will be to decrease the amount of speech on controversial topics. If government cannot know with certainty whether it will find itself unwilling host to free-standing symbols repugnant to its citizens because it maintains a public forum at the seat of government, then it would be well-advised to close the forum. The upshot would be that not only would free-standing symbols be excluded, but all speech would be silenced. Plainly, government has the power to do just that in any but the traditional public forum. *Perry Educ. Assoc. v. Perry Local Educator's Assoc.*, 460 U.S. 37 (1983). This Court should not encourage that development by dint of uncertain and conflicting results in lower court cases.

CONCLUSION

For the reasons stated, the Court should grant a writ of certiorari to review the judgment of the Sixth Circuit.

Respectfully Submitted



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November 18, 1994

FEB 21 1995

94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard H. Finan,
Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 24, 1994
CERTIORARI GRANTED JANUARY 13, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Proceedings include all events. TERMED
2:93cvl1162 Pinette, et al v. Capitol Sq Review Bd, et al
REFER

12/15/93 1 COMPLAINT (Summons issued) (referred to Mag. Judge Mark R. Abel) () (br)

12/15/93 2 ORDER by Judge James L. Graham; In-court hearing on the request for TRO & PI 9:00 12/20/93 Parties to file briefs by 12-17-93 at 3:00 pm. (cc: all counsel) (no pgs: 1) (br) [Entry date 12/16/93]

12/15/93 3 ORDER by Judge James L. Graham a hearing on the request for tro and pl is set for 12-20-93 at 9:00. (cc: all counsel) (no pgs: 1) (br) [Entry date 12/16/93]

12/17/93 4 MOTION by plaintiff for temporary restraining order and preliminary injunction ( ) (br)

12/17/93 5 AFFIDAVIT/Verification of Complaint by Vincent Pinette regarding complaint [1-1] ( ) (br)

12/17/93 6 RESPONSE by defendant to motion for temporary restraining order and preliminary injunction [4-1] ( ) (br)

12/17/93 7 STIPULATIONS of Fact between parties ( ) (br)

12/20/93 8 Verified AMENDED COMPLAINT by plaintiff ( ) (br)

12/20/93 9 CIVIL MINUTES: Proceeding before Judge James L. Graham on the motion for TRO and Prel INj. An order will issued after 9:00 a.m. on the 21 of December if the State of Ohio has not made a final decision on the application of the KKK to erect a cross at the State House for the holiday season. Pat Shaw and Joan Koenig reporting. (cc: all counsel) (no pgs: 1) (br) [Entry date 12/21/93]

12/20/93 10 Additional memorandum by defendant re: pending adm. hearing ( ) (br) [Entry date 12/21/93]

12/20/93 -- TRANSCRIPT filed by defendants of the 12-17-93 hearing before the hearing officer (br) [Entry date 12/21/93]

12/20/93 11 CERTIFICATE of Service by defendant ( ) (br) [Entry date 12/21/93]

12/20/93 12 Supplemental memorandum by defendant to motion for temporary restraining order and preliminary injunction [4-1] ( ) (br) [Entry date 12/21/93]

12/21/93 13 ORDER by Judge James L. Graham granting motion for temporary restraining order and preliminary injunction [4-1] allowing the pltf. to erect a cross on the State House grounds for the holiday season. (cc" all counsel) (no. pgs: 15) (br)

12/21/93 14 JUDGMENT ENTERED as to #13: (cc: all counsel) (no pgs: 2) (br)

Proceedings include all events. TERMED
2:93cv11162 Pinette, et al v. Capitol Sq Review Bd, et al
REFER

12/21/93 15 CIVIL MINUTES: Proceeding before Judge James L. Graham the Court heard discussion on the advisory board's decision from bothe sides. An order was issued, granting the tro and allowing a latin cross to be erected on the state house grounds. Joan Koenig reporting. (cc: all counsel) ( ) (br)

12/21/93 16 NOTICE OF APPEAL by defendant Capitol Sq Review Bd, defendant Ronald T. Keller, defendant Daniel Shellenbarger, defendant Richard H Finan from Dist. Court decision [13-1] of 12/21/93 (no pgs: 2) (sm)

12/21/93 -- APPEAL FEE pd in amount of $ 105.00 (Receipt # 122171) (sm)

12/21/93 -- APPEAL NOTIFICATION issued CA. (faxed to USCA) (sm)

12/21/93 17 ORDER by Judge James L. Graham In-court hearing on cts 2,3 and 4 of the complaint set on 1/3/93 at 9:00 a.m. (cc: all counsel) ( ) (br) [Entry date 12/22/93]

12/22/93 18 ORDER OF USCA 6th: The motion for a stay pending appeal is DENIED. (faxed via USCA). (no pgs: 2) (sm)

12/27/93 -- RECEIPT OF USCA APPEAL NUMBER - Number Assigned: 93-4367 (sm)

12/27/93 19 ORDER OF USCA 6th: the motion for a stay pending appeal is denied. (no pgs: 2) (sm)

12/27/93 20 CIVIL MINUTES: Proceeding before Judge James L. Graham hearing held on issues to be presented and discovery matters to be covered before the Jan 3, 1994 hearing. Chris Cook for the Ohio AG, Benson Wolman for plaintiffs. Court Reporter Pat Shaw. (cc: all counsel) (no pgs. 1) (br) [Entry date 12/28/93]

1/3/94 21 MOTION by intervenor Ohio Civil Rights Coalition to intervene ( ) (br)

1/3/94 22 MOTION by amicus curiae Columbus City of for leave to file brief amicus curiae ( ) (br)

1/3/94 23 CIVIL MINUTES: Proceeding before Judge James L. Graham hearing began on counts 2,3, and 4 of the pltf. complaint and granting the City of Cols. motion for leave to file brief amicus curiae [22-1], denying Oh Civil Rights Coalition motion to intervene [21-1], but allowing them to file a brief amicus curiae. Court Reporter Joan Koenig. (cc: all counsel) (no pgs: 1) (br)

1/3/94 24 BRIEF FILED by City of Columbus regarding motion for leave to file brief amicus curiae [22-1] ( ) (br)

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Proceedings include all events. TERMED
2:93cv11162 Pinette, et al v. Capitol Sq Review Bd, et al
REFER

1/3/93 25 RESPONSE by defendant in opposition to the motion for injunctive relief on counts 2,3 and 4 of the complaint ( ) (br)

1/3/94 -- TRANSCRIPT filed of the 12-20-93 proceedings (1 vol) (br)

1/3/94 -- Deposition of Thomas Robb (br)

1/4/94 26 MOTION by plaintiff for attorney fees (no pgs: 3) (br)

1/4/94 27 ORDER by Judge James L. Graham the defendants are ordered to grant a permit for the 1-15-94 rally, pltf. claim for money damages is dismissed with prejudice and the costs of this action are assessed against the defendants and this case is dismissed (cc: all counsel) (no pgs: 11) (br) [Entry date 01/05/94]

1/5/94 28 JUDGMENT ENTERED in favor of the plaintiffs: (cc: all counsel) ( ) (br)

1/18/94 29 SUPPLEMENTAL MOTION by plaintiff for attorney fees ( ) (br) [Entry date 01/19/94]

1/25/94 30 RESPONSE by defendant to motion for attorney fees [29-1], motion for attorney fees [26-1] ( ) (br) [Entry date 01/26/94]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GENERAL DOCKET
Sixth Circuit Court of Appeals

93-4367 93-4367

Court of Appeals Docket #: 93-4367
Filed: 12/21/93
Nsuit: 3440 Civil Rights: Other
Pinette, et al v. Capitol Sq Review Bd, et al

Appeal from: Southern District of Ohio at Columbus

Case Type information:

1) Civil
2) private
3) civil rights

Lower court information:

District: 0648-2 : 93-01162
Trial Judge: James L. Graham, District Judge
Date Filed: 12/15/93
Date order/judgment: 12/21/93
Date NOA filed: 12/21/93

Fee status: paid

Prior cases:
None
Current cases:
None

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93-4367 Pinette, et al v. Capitol Sq Review Bd, et al

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DONNIE A. CARR Plaintiff - Appellee	Benson A. Wolman (See above) [NTC ret] David Goldberger (See above) [COR NTC ret]

KNIGHTS OF THE KU KLUX KLAN,
Ohio Realm

Plaintiff - Appellee

Benson A. Wolman
(See above)
[COR LD NTC ret]
David Goldberger
(See above)
[COR ret]

v.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

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93-4367 Pinette, et al v. Capitol Sq Review Bd, et al

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FTS 466-5087
614-539-1661

	[NTC ret] Office of the Attorney General of Ohio 30 E. Broad Street 17th Fl. State Office Tower Columbus, OH 43215-3428
RONALD T. KELLER - Defendant - Appellant	Andrew S. Bergman (See above) [COR NTC ret]
	Richard A. Cordray (See above) [NTC ret]
DANIEL SHELLENBARGER Defendant - Appellant	Andrew S. Bergman (See above) [COR NTC ret]
	Richard A. Cordray (See above) [NTC ret]
RICHARD H. FINAN, Senator Defendant - Appellant	Andrew S. Bergman (See above) [COR ret]
	Richard A. Cordray (See above) [COR LD NTC ret]

VINCENT J. PINETTE; DONNIE A. CARR; KNIGHTS OF THE KU KLUX KLAN, Ohio Realm

Plaintiffs - Appellees

v.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD; RONALD T. KELLER; DANIEL SHELLENBARGER; RICHARD H. FINAN, Senator

Defendants - Appellants

12/21/93	Civil Case Docketed. Notice filed by Appellant Capitol Sq Review Bd, Appellant Ronald T. Keller, Appellant Daniel Shellenbarger, Appellant Richard H. Finan. Transcript needed: y (nb)
12/22/93	Appellant MOTION filed for a stay of injunction pending appeal [878026-1], with memorandum in support attached

to the motion. Motion filed by Richard A. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd. Certificate of service date 12/22/93 [93-4367] (mmd)

12/22/93 Appellee RESPONSE in opposition filed regarding a motion for miscellaneous relief [878026-1]; previously filed by Richard A. Cordray. Response from Benson A. Wolman for Appellee Knights of KKK, Appellee Donie A. Carr, Appellee Vincent J. Pinette. Certificate of service date 12/22/93 [93-4367] (mmd)

12/22/93 ORDER filed denying motion for a stay pending appeal filed by Richard A. Cordray. {93-4367]. Cornelia G. Kennedy, Circuit Judge, David A. Nelson, Circuit Judge, Albert J. Engel, Senior Judge. (tmb)

12/22/93 LETTER SENT TO district court by tmb sending a certified copy of order filed 12/22/93. [93-4367] (tmb)

12/23/93 U.S. Supreme Court order filed deferring to the judgment of the Court of Appeals and denying the stay of an injunction entered by the district court and upheld by the Court of Appeals. Filed in the Supreme Court on

12/23/93. (bb)

1/5/94 — TRANSCRIPT ORDER FORM filed by Richard A. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd: Transcript on file in district court.
[93-4367] [884192-1]

1/5/94 — APPEARANCE filed by Attorneys C. Cook, A. Sutter, A. Bergman, and R. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd. [93-4367] (vf)

1/6/94 — PRE-ARGUMENT STATEMENT filed by Richard A. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd [93-4367] (vf)

1/7/94 — BRIEFING LETTER sent setting briefing schedule: appellant brief due 2/22/94; appellee brief due 3/28/94; appendix due 4/21/94 [93-4367]. (NB)

1/794	APPEARANCE filed by Attorneys D. Goldberger and B. Wolman for Appellee Knights of KKK, Appellee Donnie A. Carr, Appellee Vincent J. Pinette [93-4367] (vf)
1/25/94	Briefing Letter Sent by CONFERENCE ATTORNEY'S OFFICE resetting briefing schedule: appellant brief due now 2/8/94; appellee brief now due 3/14/94; appendix now due 3/28/94 [93-4367]. THIS IS AN EXPEDITED SCHEDULE AGREED TO BE COUNSEL. (trm)
2/1/94	Pre-Argument Conference work complete. (wjr)
2/15/94	BRIEF filed by Richard A. Cordray for Appellants Richard H. Finan, Daniel Shellenbarger, Ronald T. Keller, Capitol Sq Review Bd. Copies: 5. Certificate of service date 2/8/94 [93-4367] (teb)
2/15/94	Request to require oral argument filed by Richarad A. Cordray for Appellants Richard H. Finan, Daniel Shellenbarger, Ronald T. Keller, Capitol Sq. Reveiw Bd. [93-4367] (teb)
2/15/94	Appellant MOTION filed to expedite

	oral argument with memo in support. Motion filed by Richard A. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd. Certificate of service date 2/8/94 [93-4367] (mmd)
2/23/94	ORDER filed granting motion to expedite oral argument [904311-1] filed by Richard A. Cordray. The appeal shall be scheduled at the earliest practicable date. [93-4367] (tmb)
3/14/94	Appellee MOTION filed to extend time to file brief. Motion filed by Benson A. Wolman for Appellee Donnie A. Carr, Appellee Vincent J. Pinette, Appellee Knights of KKK. Certificate of service date 3/11/94. [93-4367] (mmd)
3/14/94	LETTER SENT by mmd granting motion to extend briefing [917127-1] filed by Benson A. Wolman [93-4367] resetting briefing schedule: appellee brief now due 3/21/94; appendix now due 4/11/94 [93-4367] (mmd)
3/22/94	BRIEF filed by Benson A. Wolman for Appellees Donnie A. Carr, Vincent J. Pinette, Knights of KKK. Copies: 10. Certificate of service date 3/21/94 [93-4367] (teb)

3/22/94	Request to require oral argument filed by Benson A. Wolman for Appellees Donnie A. Carr, Vincent J. Pinette, Knights of KKK [93-4367] (teb)

93-4367 Pinette, et al v. Capitol Sq Review Bd, et al

3/30/94	SUBSTITUTE BRIEF TENDERED. Received from Benson A. Wolman for Appellees Donnie A. Carr, Vincent J. Pinette, Knights of KKK. [93-4367] Copies: 10. Certificate of service date 3/21/94 Corrections to be made: motion pending for leave to file substitute brief. (teb)
3/30/94	Appellee MOTION filed to file substitute brief. Motion filed by Benson A. Wolman for Appellees Donnie A. Carr, Vincent J. Pinette, Knights of KKK. Certificate of service date 3/29/94. [93-4367] (teb)
3/30/94	BRIEF filed by Benson A. Wolman for Appellees Donnie A. Carr, Vincent J. Pinette, Knights of KKK. Copies: 10. Certificate of service date 3/21/94 [93-4367] (teb)

4/1/94	Oral argument date set for 6/21/94 in court room 836. Notice of argument sent to counsel. [93-4367] (paw)
4/6/94	REPLY BRIEF filed by Richard A. Cordray for Appellants Richard H. Finan, Daniel Shellenbarger, Ronald T. Keller, Capitol Sq Review Bd. Copies: 6. Certificate of service date 4/4/94 [93-4367] (teb)
4/8/94	Appellant MOTION filed to extend time to file appendix. Motion filed by Richard A. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd. Certificate of service date 4/7/94 [93-4367] (mmd)
4/13/94	LETTER SENT by mmd granting motion to extend time to file appendix [932543-1] filed by Richard A. Cordray [93-4367] per hearing panel on 4/11/94 resetting briefing schedule: appendix now due 4/15/94 [93-4367] (mmd)
4/13/94	CERTIFIED RECORD filed. Volumes include: 3 Tr; 2 Dep; 1 Pl. [93-4367] (hrm)
4/15/94	APPENDIX filed by Richard A. Cordray for Appellants. Copies: 5. Certificate of service date 4/14/94 [93-4367] (pje)

5/25/94	RULING granting motion to file substitute brief [927616-1] filed by Benson A. Wolman [93-4367] (LG/bb per hearing panel, 5/24/94; counsel notified by mail 5/25/94. (bb)
6/21/94	ADDITIONAL CITATION filed by Benson A. Wolman for Appellee Donnie A. Carr, Appellee Vincent J. Pinette, Appellee Knights of KKK. Certificate of service date 6/20/94 [93-4367] (mmd)

93-4367 Pinette, et al v. Capitol Sq Review Bd, et al

6/21/94	CLAUSE ARGUED on 6/21/94 by Richard A. Cordray for Appellant Richard H. Finan, Appellant Daniel Shellenbarger, Appellant Ronald T. Keller, Appellant Capitol Sq Review Bd, Benson A. Wolman for Appellee Donnie A. Carr, Appellee Vincent J. Pinette, Appellee Knights of KKK before Judges Jones, Ryan, Krupansky. [93-4367] (me)
7/25/94	OPINION filed: AFFIRMED; decision for publication pursuant to local rule 24 [93-4367]. Nathaniel R. Jones, Circuit Judge, James L. Ryan,

	Authoring Judge, Robert B. Krupansky, Senior Judge. (tmb)
7/25/94	JUDGEMENT: AFFIRMED. (tmb)
8/16/94	MANDATE ISSUED with no cost taxed [93-4367] (vf)
8/17/94	CERTIFIED RECORD RETURNED to lower court at the end of appellate proceedings. [93-4367]. Volumes included: 1 Pl; 3 Tr; 2 Dep;. (tt)
11/7/94	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellant Capitol Sq Review Bd. Filed in the Supreme Court on 10/24/94, Supreme Ct. case number: 94-780. [93-4367] (swh)
1/19/95	U.S. Supreme Court order filed granting petition for writ of certiorari [1040663-1] filed by Capitol Sq Review Bd., et al. [93-4367[[[[]. Filed in the Supreme Court on 1/13/95. (swh)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette P.O. Box 620007 Cleveland, Ohio 44102	:	
and	:	
Donnie A. Carr P.O. Box 28705 Columbus, Ohio 43228-0705	:	
and	:	
Knights of the Ku Klux Klan (Ohio Realm) P.O. Box 620007 Cleveland, Ohio 44102,	:	
Plaintiffs,	:	
v.	:	Case No. C2-93-1162
Capitol Square Review and Advisory Board The Statehouse Columbus, Ohio 43215	:	JUDGE GRAHAM
and	:	MAGISTRATE JUDGE ABEL
Ronald T. Keller, Daniel Shellenbarger, and Richard H. Finan,	:	

c/o The Statehouse :
Columbus, Ohio 43215, :
individually and in their
official capacities, :

Defendants. :

- -

COMPLAINT

I. Preliminary Statement

1. This is an action for declaratory and injunctive relief and for damages brought by members of the Ku Klux Klan because the Capitol Square Review and Advisory Board and its members and employees have rejected the application of the Plaintiffs to erect a free-standing, privately owned cross as part of the 1993 holiday display on the Statehouse grounds. In addition, the suit seeks to void a bill from public officials for security services related to a prior use of the Statehouse grounds and to require the Defendants to approve a permit to hold a January rally on Capitol Square. The action seeks declaratory and injunctive relief and damages for these deprivations and for a pattern of denial of rights of the Plaintiffs.

II. Jurisdiction

2. The claims for relief and causes of action alleged herein arise under 42 U.S.C.§ 1983, the First and Fourteenth Amendments and Article I, Section 10 of the Constitution of the United States.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343, 42 U.S.C. Section 1983.

4. Declaratory and injunctive relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

III. Venue

5. This action properly lies in the Southern District of Ohio, Eastern Division, pursuant to 28 U.S.C. § 1391(b), because the critical Defendants are found in this judicial district and all Defendants reside in this state and because a substantial part of the events or omissions, and all of the property, that are the subject of the action are located in Franklin County, Ohio.

IV. Parties

6. Plaintiff Vincent J. Pinette is the Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm); Plaintiff Donnie A. Carr is the Unit Coordinator for Columbus, Ohio of the Knights of the Ku Klux Klan (Ohio Realm); and, the Knights of the Ku Klux Klan (Ohio Realm) is an unincorporated association whose members reside in the State of Ohio.

7. Plaintiff Pinette resides in Cuyahoga County, Ohio; Plaintiff Carr resides in Franklin County, Ohio; and Plaintiff Knights of the Ku Klux Klan (Ohio Realm) is headquartered in Cuyahoga County, Ohio.

8. Defendant Capitol Square Review and Advisory Board is the state board chartered under Ohio Revised Code Section 123.022 that controls the land and facilities which comprise the Statehouse and its environs in downtown Columbus.

9. Defendant Keller is the Executive Director of

the Capitol Square Review and Advisory Board; Defendant Shellenbarger is the spokesperson for the board; and Defendant Finan, a state senator, is the chairperson of the board. They are sued in their official and personal capacities.

10. The Board is situated in Franklin County, Ohio; Defendants Keller and Shellenbarger reside in Franklin County, Ohio; and Defendant Finan resides in Hamilton County, Ohio.

11. The various acts and omissions alleged herein were engaged in and carried out by, between and among the individual Defendants acting personally and while said Defendants were employed by or acting for the State of Ohio. All of the actions alleged herein were engaged in and carried out by, between and among individual Defendants, under color of state law.

V. Facts

12. For more than a century, Capitol Square has been a traditional, public forum located in downtown Columbus. It is the seat of government of the State of Ohio. It is surrounded on all sides by streets and by public and private offices and business establishments and places of accommodation or amusement. Capitol Square traditionally has been used by office holders, office seekers, non-profit enterprises, commercial enterprises, and individuals for speeches, gatherings, and displays.

13. For many years during the period stretching from approximately Thanksgiving until the new year, Capitol Square has been adorned with festival lights and a Christmas tree. In recent years public authorities controlling Capitol

Square have granted the requested permit of the Lubavitcher sect of the Jewish faith to erect a free-standing Hanukkah menorah, a nine-branch candelabrum which is the primary visual symbol of the Jewish holiday of Hanukkah and which has both religious and secular significance.

14. During the course of the year private persons and organizations are regularly permitted to gather and to erect temporary structures on the Capitol Square pertaining to a variety of subjects, religious, commercial, political, social and secular.

15. In August 1993, the Plaintiffs and their associates applied for and were granted a permit to hold a rally at the Statehouse on October 23, 1993.

16. Plaintiffs and their associates peaceably engaged in their rally at that site on that date.

17. Many demonstrators, not all of whom were peaceable, gathered to protest the presence and message of the Plaintiffs.

18. Many officers of the State Highway Patrol, the Columbus Police Department and the Franklin County Sheriff's Department were deployed to protect the speakers from hostile demonstrators.

19. Following the event, local and state officials announced that they would send a bill for security services for the October rally to the Plaintiffs.

20. Following those announcements, Plaintiffs stated that if a bill was sent, they would seek to hold a rally on January 15, 1994 to protest the charges and discriminatory treatment by governmental officials.

21. A bill for $15,116.76 for security-related costs was sent to Plaintiffs by Defendant Capitol Square Review and Advisory Board on October 26, 1993. A copy of that bill is attached hereto as Exhibit 1. Plaintiffs are informed and believe that additional charges will be imposed.

22. Plaintiffs are informed and believe that, before and after the billing, state officials stated that no future permit should be granted until the bill was paid.

23. On October 29, 1993, Plaintiffs applied for a permit to use the Statehouse steps for a rally at which they expected up to 50 associates to attend. A copy of that application is attached as Exhibit 2.

24. As of the date of filing this action, the Defendants have refused to act on the permit application to hold the January 15, 1994 rally.

25. In November 1993, the board adopted a policy precluding all religious displays at the Statehouse with the stated reason that if it approved some, it would have to approve a display of a cross by the Ku Klux Klan.

26. Days later, after substantial public and political pressure, the board reversed its position and voted to allow certain forms of holiday and other displays.

27. Following that action, the board authorized a Christmas tree and a menorah to be erected. The state has permitted a Christmas tree and lights to be displayed this year since December 7. The state annually expends state resources in connection with holiday displays.

28. On November 29, 1993, the rabbi who heads the Lubavitcher congregation applied for, and on the same

day the state granted, permission to erect a Hanukkah menorah from December 8 through December 16, 1993. A copy of the application is attached hereto as Exhibit 3. The menorah is presently on display on the Statehouse grounds.

29. Also on November 29, 1993, the Plaintiffs in this action, through Plaintiff Carr, applied for a permit to place a cross on the Statehouse grounds from December 8, 1993 through December 24, 1993. A copy of that application is attached hereto as Exhibit 4.

30. The cross was to be approximately ten feet high, six feet across, made from 2 x 6 lumber, painted white, secured upright by a free-standing tripod, and would have been accompanied by a sign readily visible from a distance stating "This cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property" or words of similar import or as might otherwise be negotiated with the Defendants.

31. On December 3, 1993, Defendant Keller wrote, and on December 6, 1993 Mr. Carr received, a letter rejecting the Ku Klux Klan application to erect its cross. A copy of that letter is attached hereto and incorporated herein as Exhibit 5.

32. On December 9, 1993, counsel for the Plaintiffs met with counsel for the Defendants, and the Plaintiffs filed a Notice of Appeal and Request for an Expedited Hearing.

33. On December 10, 1993 the State sent, and on December 13, 1993 the Plaintiffs received, a letter waiving statutory time constraints and agreeing to an expedited

hearing.

34. To date, no hearing has been held and the denial stands.

Count One

35. By refusing to allow the Plaintiffs to erect their cross as part of the Capitol Square holiday display, the Defendants (a) have violated the guarantees of freedom of expression and free exercise of religion secured under the First and Fourteenth Amendments to the Constitution of the United States; (b) have deprived the Plaintiffs of the equal protection of the laws and due process of law secured under the Fourteenth Amendment to the Constitution of the United States; and (c) have engaged in conduct that constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

Count Two

36. By denying a Plaintiff a permit to hold a rally on January 15, 1994, the Defendants (a) have violated the guarantees of freedom of expression and assembly secured under the First and Fourteenth Amendments to the Constitution of the United States; (b) have deprived the Plaintiffs of the equal protection of the laws and due process of law secured under the Fourteenth Amendment to the Constitution of the United States; and (c) have engaged in conduct that constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

Count Three

37. By billing the Plaintiffs and refusing to retract the billing for security costs related to the rally, the Plaintiffs

for security costs related to the rally, Defendants (a) have chilled and violated the guarantees of freedom of expression and assembly secured under the First and Fourteenth Amendments to the Constitution of the United States; (b) have deprived the Plaintiffs of the equal protection of the laws and due process of law secured under the Fourteenth Amendment to the Constitution of the United States; and (c) have engaged in conduct that constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

Count Four

38. The conduct of the Defendants set forth above constitutes a continuing pattern of harassment and discriminatory conduct because of the political viewpoints of the Plaintiffs and (a) violates the free speech guarantees of the First and Fourteenth Amendments; (b) violates the equal protection of the laws and due process of the law guaranteed under the Fourteenth Amendment; and (c) is tantamount to a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

VI. Injury

51. The Plaintiffs have suffered and will continue to suffer irreparable injury by virtue of the Defendants' actions as described above, and the Plaintiffs are without an adequate legal remedy with which to address the aforementioned constitutional and other violations.

52. In addition, the plaintiffs have suffered injury by virtue of the conduct of the Defendants as described above, including personal expense and the necessary devotion of extraordinary time and attention by the Plaintiffs in order to secure their rights.

WHEREFORE, Plaintiffs request the following relief:

1. That a declaratory judgment issue, and a temporary retraining order, and preliminary and permanent injunctions be entered ordering the Defendants to permit the Plaintiffs to display their cross as a part of the 1993 holiday on Capitol Square.

2. That a declaratory judgment issue, and preliminary and permanent injunctions be entered directing the Defendants to permit the Plaintiffs to hold their January 15, 1994 rally.

3. That a declaratory judgment issue, and preliminary and permanent injunctions be entered voiding the billing for security services.

4. That the Plaintiffs be awarded damages in the amount of $1,000.00 for their expenditures and added time and attention necessary to secure their rights.

5. That the Plaintiffs be awarded their costs and attorneys' fees pursuant to 42 U.S.C. Section 1988.

6. That the Plaintiffs have such other relief as the court deems proper.

Respectfully submitted,

Benson A. Wolman
(0040123)
Trial Attorney
3600 Olentangy River Road,
Bldg. 501
Columbus, Ohio 43214-3913

(614) 459-4140
(614) 459-4503 (facsimile)

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Attorneys for Plaintiffs

Of Counsel
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American Civil Liberties Union
of Ohio Foundation
1223 West Sixth Street
Cleveland, Ohio 44113
(216) 781-6278

COLUMBUS PUBLIC SCHOOLS

COLUMBUS BOARD OF EDUCATION
Columbus Public Schools*270 East State Street*
Columbus, Ohio 43215

December 9, 1993

Elizabeth Mayo
Porter, Wright, Morris & Arthur
41 S. High Street - 28th Floor
Columbus, OH 43215

Dear Ms. Mayo:

As a citizen and public official, I write to counsel each member of the Capitol Square Review and Advisory Board to deny the Ku Klux Klan's application to demonstrate on Statehouse grounds on the very day the nation honors the memory of Dr. Martin Luther King, Jr. The Klan is a scabrous assembly of gangsters, the unspeakable history of which constitutes a monstrous litany of crimes against humanity and the republic. By virtue of becoming a Klansman, every member, regardless of his personal actions, dips his hands in the blood unjustly shed by thousands of black women, children, and men, whose fearful sufferings and ghastly deaths will forever remain unrequited, both at law and by the standards of universal morality.

Any presumably noble appeal to the Klan's First Amendment rights cannot withstand principled scrutiny. Their very appearance before the seat of state government on a day of heightened emotional resonance is tantamount to maliciously shouting "Fire!" in a crowded theater. America's eminent jurists have long held that free speech

encounters its limits when good order and the common weal are immediately threatened.

There are times when passionate believers in the Constitution affirm that government does possess a transcendent right to prohibit malefactors from using the people's property and democratic symbols to promote evil. Denying the Klan's request is not only prudent, it is also in the best Constitutional tradition. If the Klan sues and if a court misguidedly awards it a favorable judgment, so be it! I, among many, would consider payment of damages a virtuous use of public funds if it prevented civic disorder and an affront to the community's sense of right and wrong.

Yours very truly for the cause that needs assistance,

Bill Moss
Member

Plaintiff's
Exhibit
1

INVOICE

OCTOBER 26, 1993

MICHAEL LOWE
P. O. BOX 2056
WACO TX 76703

CAPITOL SQUARE
REVIEW AND
ADVISORY BOARD

The Statehouse
Columbus, Ohio 43215
(614) 752-5209
FAX (614) 752-5209

DESCRIPTION OF SERVICES

Hon. Richard Finan
Chairman

PARKING GARAGE REVENUE LOSES $ 1,243.50

PROTECTIVE FENCING 9,179.00

Ronald T. Keller
Executive Director

LABOR COSTS - PLANNING, SETUP, TEARDOWN,

Christopher Cook
Assistant Attorney General
Legal Counsel

MATERIALS AND CLEANUP 4,694.26

TOTAL AMOUNT DUE: $15,116.76

TERMS: NET - 30 DAYS FROM INVOICE DATE

PLEASE MAKE CHECK PAYABLE TO:

CSRAB
OHIO STATEHOUSE
COLUMBUS, OH 43215

CC: VINCE PINETTE

Plaintiff's
Exhibit
2

Capitol Square Review & Advisory Board
Phone: 614/752-9777 Fax: 614-/7525208
Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date: _____

Capitol Square Review and Advisory Board exercises supervision and control of Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Knights of the Ku Klux Klan

Representative's name, address, phone #: Vince Pinette, P.O. Box [illegible] Cleve. Ohio 44102
216-631-0305

to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): Sat Jan 15 1994 2:00- 4:00 p.m.

Event time: 2:00 & 4:00 p.m. Portion of Capitol Square to be occupied: north steps

Approximate number of persons to attend: 50

Type of event: Rally

Use: The user organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause.
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws. [NO PRICE ON FREE SPEECH]*
3. Bond Requirement: An optional bond may be required based on the nature of the event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.
4. Facility Protection: The user organization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.
5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.
6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.
7. Signs, Banners, Flags: The use of stickers or labels,

cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited

8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be charged to the permit holder.
9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.
10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.
11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.
12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.
13. Liability: The user organization shall indemnify and

hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

*HAND WRITTEN BY
APPLICANT

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

___ ACCEPTED

C.S.R.A.B. only _____ ___
DENIED

Fee: $20.00 refundable C . S . R . A . B .
REPRESENTATIVE
Paid: $20.00

I have read the above permit and agree to the terms and conditions therein

Date: 10-29-93
Check:

X_____
PERMIT APPLICANT

DATE 10-/29-93

PLAINTIFF'S
EXHIBIT 3

Capitol Square Review & Advisory Board
Phone: 614/752-9777 Fax: 614-/7525208

Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date: 11-29-93

Capitol Square Review and Advisory Board exercises supervision and control of Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Rabbi [illegible]

Representative's name, address, phone #: [illegible] to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): Dec. 8, 16, 93

Event time: N/A Portion of Capitol Square to be occupied: Grounds

Approximate number of persons to attend: N/A

Type of event: Seasonal Display

Use: The us organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to:

Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause..

2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws.

3. Bond Requirement: An optional bond may be required based on the [illegible] of the event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.

4. Facility Protection: The user organization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.

5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.

6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.

7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative

condition of the Capitol buildings or any permanent structure on the premises be prohibited

8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be charged to the permit holder.
9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.
10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.
11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.
12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.
13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or

persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

*HAND WRITTEN BY
APPLICANT

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

X ACCEPTED (RTK)

C.S.R.A.B. use only_____ —
DENIED

Fee: $20.00 C.S.R.A.B. REPRESENTATIVE
Paid: $20.00 I have read the above permit and agree to the terms and
Date: 11/29/93 conditions specified therein
Clerk: Cash

_____
PERMIT APPLICANT
DATE 11/29/93

PLAINTIFF'S
EXHIBIT 4

Capitol Square Review & Advisory Board
Phone: 614/752-9777 Fax: 614-/7525208
Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date:

Capitol Square Review and Advisory Board exercises supervision and control of
Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Knights of the Ku Klux Klan (Realm of Ohio)

Representative's name, address, phone #: Donnie A. Carr (216) 631-0305
P.O. Box 28705, Columbus, Ohio, 43228-0705
to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): 12-8-93

Event time: All day 24 hours Dec. 8 - 24, 1993 Portion of Capitol Square to be occupied: State House Lawn (Front)

Approximate number of persons to attend:

Type of event: Erect a Cross for Christmas

Use: The user organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause..
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws. **[DOES NOT APPLY]***

3.X Bond Requirement: An optional bond may be required based on the nature event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.

4. Facility Protection: The userorganization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.

5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.

6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.

7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited

8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be

charged to the permit holder.

9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.
10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.
11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.
12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.
13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

___ ACCEPTED

C.S.R.A.B. only _____ X DENIED
Fee: $20.00 nonrefundable C . S . R . A . B .
REPRESENTATIVE
Paid: $20.00 I have read the above permit and agree to the terms and conditions specified therein
Date: 1/29/93
Check: Cash

_____
PERMIT APPLICANT
DATE 11-29-93

HAND WRITTEN IN BY APPLICANT*

PLAINTIFF'S
EXHIBIT 5

CAPITOL SQUARE
REVIEW AND
ADVISORY BOARD

The Statehouse
Columbus, Ohio 43215
(614) 752-9777
FAX (614) 752-5209

Hon. Richard Finan
Chairman

Ronald T. Keller
Executive Director

Christopher Cook
Assistant Attorney
General
Legal Counsel

December 3, 1993

Donnie A. Carr
P.O. Box 28705
Columbus, Ohio 43220-0705

Dear Mr. Carr:

Pursuant to Ohio Administrative Code 128-4-02(B), the Capitol Square Review and Advisory Board hereby gives notice that it must deny your application to erect a cross on the Statehouse Grounds between December 8, 1993 and December 24, 1993. This decision was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently rendered by the United States Supreme Court under the First Amendment to the United States Constitution.

In addition, I assume you are aware that we placed a telephone call to you earlier this week, seeking more information about the precise nature of the display you were requesting the Board to approve. We have not yet heard from you in response to that call.

Pursuant to Chapter 119, Ohio Revised Code and 128-4-04 of the Ohio Administrative Code, you are hereby advised that you may request a hearing on this matter. If your wish to request such a hearing, that request must be made in writing and received by the Capitol Square Review and Advisory Board within thirty (30) days of the date of mailing of this notice. This notice was mailed on the date indicated above.

You are further advised that you are entitled to appear in person, or by your attorney, or both, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and ex.amine witnesses appearing for and against you.

In the event there is no request for such hearing received within thirty (30) days of the date of mailing of this notice, the Capitol Square Review and Advisory Board will consider this matter closed.

Donnie A. Carr
December 3, 1993
Page Two

Section 119.07, Ohio Revised Code, in part states:

> "Whenever a party requests a hearing in accordance with this section and Section 119.06 of the Ohio Revised Code, the agency shall immediately set the date, time, and place for such hearing and forthwith notify the party thereof. The date set for such hearing shall be within fifteen (15) days, but no earlier than seven (7) days, after the party has requested a hearing, unless otherwise agreed to by the agency and the party."

Sincerely,

RON KELLER
Executive Director

Capitol Square Review and
Advisory Board

Registered Mail
Return Receipt Requested

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.	:	
Plaintiffs,	:	Case No. C2-93-1162
v.	:	Judge Graham
Capitol Square Review and Advisory Board, et al.	:	Magistrate Judge Abel
Defendants.		

VERIFICATION OF COMPLAINT

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

I, Vincent J. Pinette, hereby assert that I have read the Complaint in this action and that the information set forth therein Is true to the best of my knowledge and belief.

_____
Vincent J. Pinette

Sworn to me and signed via facsimile on this 17th day of December, 1993.

_____
Notary Public

Benson A. Wolman,
Attorney-at-Law
Notary Public - State of Ohio
My commission has no
expiration date.
Section 147.03 R.C.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.	:	
Plaintiffs,	:	Case No. C2-93-1162
v.	:	Judge Graham
Capitol Square Review and Advisory Board, et al.	:	Magistrate Judge Abel
Defendants.	:	

- -

MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiffs move this Court for a temporary restraining order and a preliminary injunction directing the Defendants to issue to the Plaintiffs the permit for the use of Capitol Square as filed on November 29, 1993 and as more fully elaborated upon, for the reasons set forth in the accompanying memorandum and incorporated herein.

Plaintiffs request that the security for this injunction be set at a minimal rate of $50.00.

Respectfully submitted,

Benson A. Wolman
(0040123)
Trial Attorney
3600 Olentangy River Road,
Bldg. 501
Columbus, Ohio 43214-3913
(614) 459-4140
(614) 459-4503 (facsimile)

David Goldberger (0010292)
of Counsel
3600 Olentangy River Road,
Bldg. 501
Columbus, Ohio 43214-3913
(614) 459-4140
(614) 459-4503 (facsimile)

Attorneys for Plaintiffs

Of Counsel
Kevin Francis O'Neill
American Civil Liberties Union
of Ohio Foundation
1223 West Sixth Street
Cleveland, Ohio 44113
(216) 781-6278

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,	:	
Plaintiffs,	:	Case No. C2-93-1162
v.	:	Judge Graham
Capitol Square Review and Advisory Board, et al.,	:	Magistrate Judge Abel
Defendants.	:	

- -

AFFIDAVIT

STATE OF OHIO
COUNTY OF FRANKLIN SS:

Affiant, Rabbi Harold J. Berman, being duly sworn on oath, states as follows:

I have been asked to comment on the question of whether the Hanukkiyah, more commonly known as a Hanukkah Menorah, is a religious symbol... I believe that even the most superficial view of Jewish tradition suggests that it is and that any claim to the contrary is unjustified.

The lighting of Hanukkah lights is mentioned with considerable detail in the Talmud, with a number of questions as to the number of lights to be lit on the days of Hanukkah and the religious obligation to set the lights in a

public place and refrain from using the light for any secular purpose. A jew is obligated to light the lights on each night of Hanukkah and is obligated to say the blessing which contains the words, "Praised are you, Lord our God, ruler of the universe, who made us holy by His commandments and commanded us to light the lights of Hanukkah."

In every generation, wherever Jews lived, they designed Hanukkah lamps, "Menorahs," with which to fill the commandment and light the lights. These were obviously considered to be ritual objects and they often adorned the synagogue in some way on a permanent basis. Traditionally the Menorah is lit in the synagogue as part of religious services each evening during Hanukkah in addition to being lit at home by the family. It is possible to say that the Menorah is a secular symbol only in the sense that any religious symbol conveys a message and the message can, nearly always, be presented in a secular light. Nonetheless, the reason Jews light the Menorah is because it is a commandment of Jewish tradition, to be lit at home and in the synagogue to the accompaniment of blessings before God. After it is lit, it is customary to place it in a public place (such as the window of one's home, or even outside next to the door of one's home) in order to, "publicize God's miracle." It is impossible, however, in the context of Jewish tradition, to separate the Menorah from the ritual with which we light it and the blessings that accompany it. To Jews it has been the religious symbol of the holiday Hanukkah since our very earliest days and to claim otherwise is to take away from the holiday the most precious religious symbol it offers us.

I hope this has been helpful. I would be pleased to offer additional information upon request.

Further Affiant Sayeth Naught,

Harold J. Berman

Sworn to before me and signed in my presence, a Notary Public in and for said State and County, on this 17th day of December, 1993.

Notary Public

Benson A. Wolman,
Attorney-At-Law
Notary Public - State of Ohio
My commission has no
expiration date
Section 147.03 R.C.

SUPPLEMENTAL EXHIBIT 101

[Reprinted in appendix to brief in opposition to writ of certiorari p. RA 23]

SUPPLEMENTAL EXHIBIT 102
[Reprinted in brief in opposition to writ of certiorari p. RA 24]

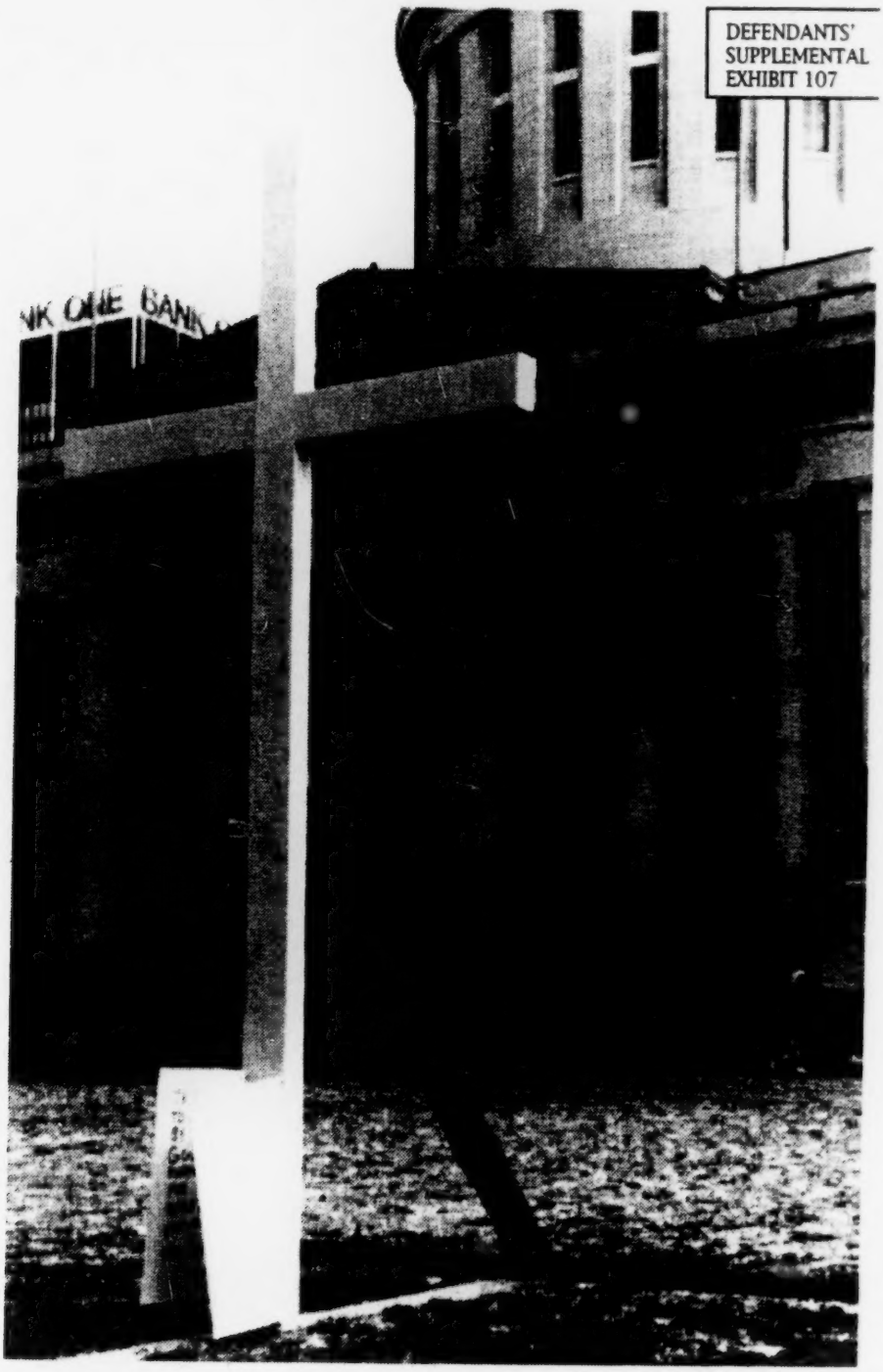
SUPPLEMENTAL EXHIBIT 103
[Reprinted in brief in opposition to writ of certiorari p. RA 28]

SUPPLEMENTAL EXHIBIT 104

SUPPLEMENTAL EXHIBIT 105
[Reprinted in brief in opposition to writ of certiorari p. RA 31]

SUPPLEMENTAL EXHIBIT 106
[Reprinted in brief in opposition to writ of certiorari p. RA 32]

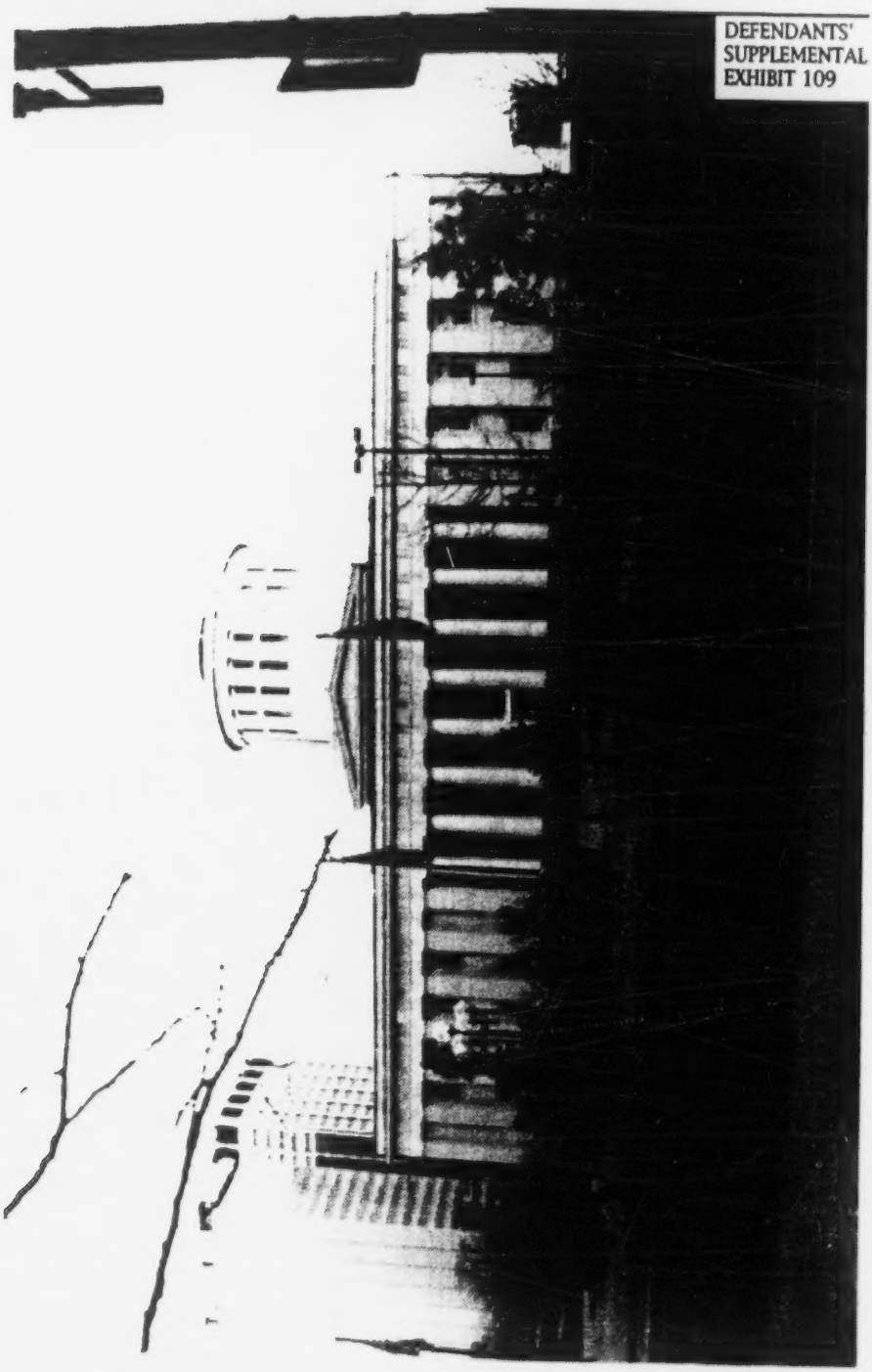
SUPPLEMENTAL EXHIBIT 107



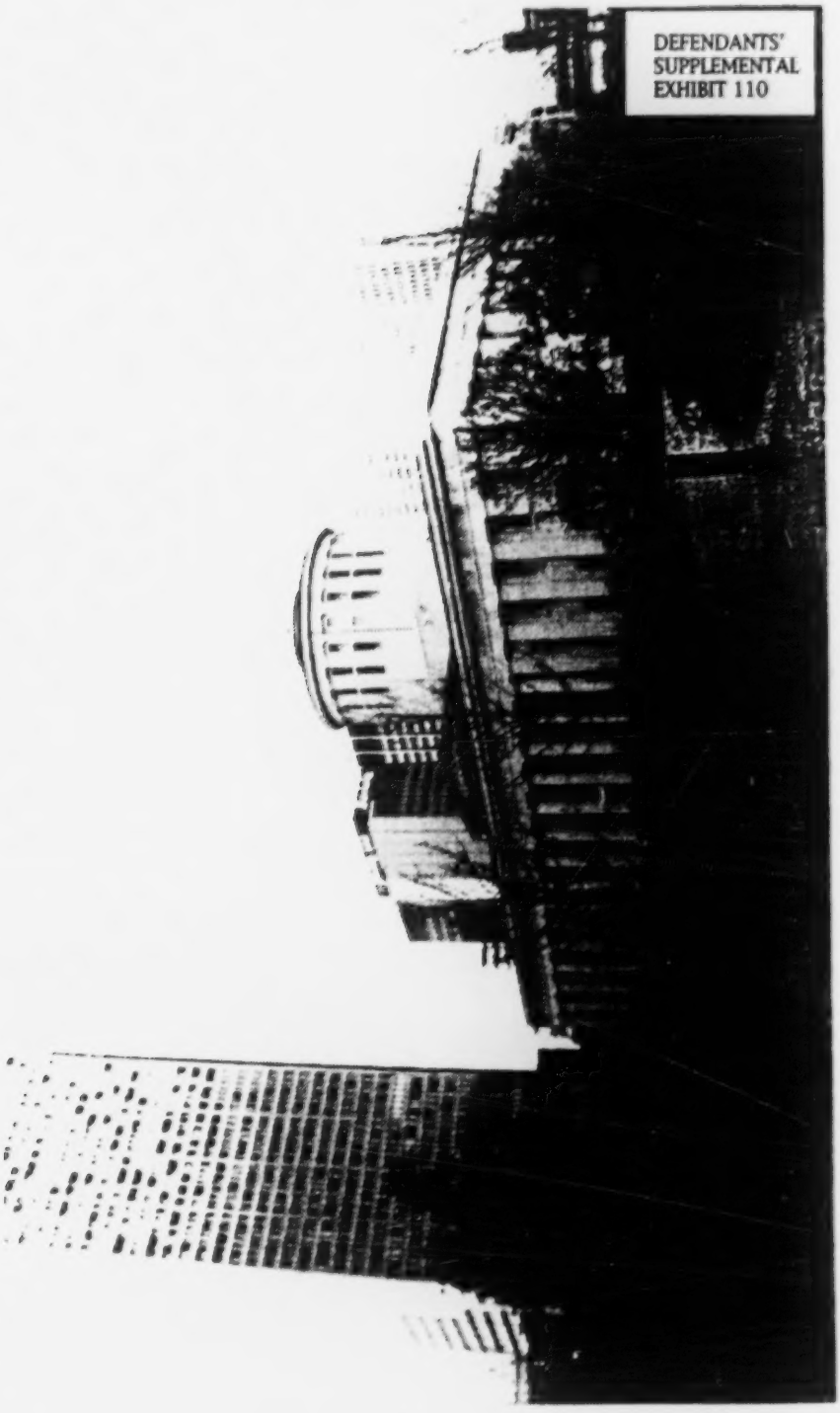
SUPPLEMENTAL EXHIBIT 108

DEFENDANTS' SUPPLEMENTAL EXHIBIT 108

SUPPLEMENTAL EXHIBIT 109



SUPPLEMENTAL EXHIBIT 110



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette P.O. Box 620007 Cleveland, Ohio 44102	:	
and	:	
Dennis A. Carr P.O. Box 28705 Columbus, Ohio 43228-0705	:	
and	:	
Knights of the Ku Klux Klan (Ohio Realm) P.O. Box 620007 Cleveland, Ohio 44102,	:	
Plaintiffs,	:	
v.	:	Case No. C2-93-1162
Capitol Square Review and Advisory Board The Statehouse Columbus, Ohio 43215	:	JUDGE GRAHAM
and	:	MAGISTRATEJUDGE ABEL
Ronald T. Keller, Daniel Shellenbarger, and Richard H. Finan,	:	

c/o The Statehouse
Columbus, Ohio 43215 :
individually and in their
official capacities, :

Defendants. :

- -

VERIFIED & AMENDED COMPLAINT

I. Preliminary Statement

1. This is an action for declaratory and injunctive relief and for damages brought by members of the Ku Klux Klan because the Capitol Square Review and Advisory Board and its members and employees have rejected the application of the Plaintiffs to erect a free-standing, privately owned cross on the Statehouse grounds. In addition, the suit seeks to void a bill from public officials for security services related to prior use of the Statehouse grounds and to require the Defendants to approve a permit to hold a January rally on Capitol Square. The action seeks declaratory and injunctive relief and damages for these deprivations and for a pattern of denial of rights of the plaintiffs.

II. Jurisdiction

2. The claims for relief and causes of action alleged herein arise under 42 U.S.C.§ 1983, the First and Fourteenth Amendments and Article I, Section 10 of the Constitution of the United States.

3. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 1331 and 1343, 42 U.S.C. Section 1983.

4. Declaratory and injunctive relief is sought pursuant to 28 U.S.C. §§ 2201 and 2202, and 42 U.S.C. § 1983.

III. Venue

5. This action properly lies in the Southern District of Ohio, Eastern Division, pursuant to 28 U.S.C. § 1391(b), because the critical Defendants are found in this judicial district and all Defendants reside in this state and because a substantial part of the events or omissions, and all of the property, that are the subject of the action are located in Franklin County, Ohio.

IV. Parties

6. Plaintiff Vincent J. Pinette is the Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm); Plaintiff Donnie A. Carr is the Unit Coordinator for Columbus, Ohio of the Knights of the Ku Klux Klan (Ohio Realm); and, the Knights of the Ku Klux Klan (Ohio Realm) is an unincorporated association whose members reside in the State of Ohio.

7. Plaintiff Pinette resides in Cuyahoga County, Ohio; Plaintiff Carr resides in Franklin County, Ohio; and Plaintiff Knights of the Ku Klux Klan (Ohio Realm) is headquartered in Cuyahoga County, Ohio.

8. Defendant Capitol Square Review and Advisory Board is the state board chartered under Ohio Revised Code Section 123.022 that controls the land and facilities which comprise the Statehouse and its environs in downtown Columbus.

9. Defendant Keller is the Executive Director of

the Capitol Square Review and Advisory Board; Defendant Shellenbarger is the spokesperson for the board; and Defendant Finan, a state senator, is the chairperson of the board. They are sued in their official and personal capacities.

10. The Board is situated in Franklin County, Ohio; Defendants Keller and Shellenbarger reside in Franklin County, Ohio; and Defendant Finan resides in Hamilton County, Ohio.

11. The various acts and omissions alleged herein were engaged in and carried out by, between and among the individual Defendants acting personally and while said Defendants were employed by or acting for the State of Ohio. All of the actions alleged herein were engaged in and carried out by, between and among individual Defendants, under color of state law.

V. Facts

12. For more than a century, Capitol Square has been a traditional, public forum located in downtown Columbus. It is the seat of government of the State of Ohio. It is surrounded on all sides by streets and by public and private offices and business establishments and places of accommodation or amusement. Capitol Square traditionally has been used by office holders, office seekers, non-profit enterprises, commercial enterprises, and individuals for speeches, gatherings, and displays.

13. For many years during the period stretching from approximately Thanksgiving until the new year, Capitol Square has been adorned with festival lights and a Christmas tree. In recent years public authorities controlling Capitol Square have granted the requested permit of the Lubavitcher

sect of the Jewish faith to erect a free-standing Hanukkah menorah, a nine-branch candelabrum which is the primary visual symbol of the Jewish holiday of Hanukkah and which has both religious and secular significance.

14. During the course of the year private persons and organizations are regularly permitted to gather and to erect temporary structures on the Capitol Square pertaining to a variety of subjects, religious, commercial, political, social and secular.

15. In August 1993, the Plaintiffs and their associates applied for and were granted a permit to hold a rally at the Statehouse on October 23, 1993.

16. Plaintiffs and their associates peaceably engaged in their rally at that site on that date.

17. Many demonstrators, not all of whom were peaceable, gathered to protest the presence and message of the Plaintiffs.

18. Many officers of the State Highway Patrol, the Columbus Police Department and the Franklin County Sheriff's Department were deployed to protect the speakers from hostile demonstrators.

19. Following the event, local and state officials announced that they would send a bill for security services for the October rally to the Plaintiffs.

20. Following those announcements, Plaintiffs stated that if a b ill was sent, they would seek to hold a rally on January 15, 1994 to protest the charges and discriminatory treatment by governmental officials.

21. A bill for $15,116.76 for security-related costs

was sent to Plaintiffs by Defendant Capitol Square Review and Advisory Board on October 26, 1993. A copy of that bill is attached hereto as Exhibit 1. Plaintiffs are informed and believe that additional charges will be imposed.

22. Plaintiffs are informed and believe that, before and after the billing, state officials stated that no future permit should be granted until the bill was paid.

23. On October 29, 1993, Plaintiffs applied for a permit to use the Statehouse steps for a rally at which they expected up to 50 associates to attend. A copy of that application is attached as Exhibit 2.

24. As of the date of filing this action, the Defendants have refused to act on the permit application to hold the January 15, 1994 rally.

25. In November 1993, the board adopted a policy precluding all religious displays at the Statehouse with the stated reason that if it approved some, it would have to approve a display of a cross by the Ku Klux Klan.

26. Days later, after substantial public and political pressure, the board reversed its position and voted to allow certain forms of holiday and other displays.

27. Following that action, the board authorized a Christmas tree and a menorah to be erected. The state has permitted a Christmas tree and lights to be displayed this year since December 7. The state annually expends state resources in connection with holiday displays.

28. On November 29, 1993, the rabbi who heads the Lubavitcher congregation applied for, and on the same day the state granted, permission to erect a Hanukkah

menorah from December 8 through December 16, 1993. A copy of the application is attached hereto as Exhibit 3. The menorah was on display on the Statehouse grounds from December 8 through December 16, 1993.

29. Also on November 29, 1993, the Plaintiffs in this action, through Plaintiff Carr, applied for a permit to place a cross on the Statehouse grounds from December 8, 1993 through December 24, 1993. A copy of that application is attached hereto as Exhibit 4.

30. The cross was to be approximately ten feet high, six feet across, made from 2 x 6 lumber, painted white, secured upright by free-standing tripod, and would have been accompanied by a sign readily visible from a distance stating "This cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property" or words of similar import or as might otherwise be negotiated with the Defendants.

31. On December 3, 1993, Defendant Keller wrote, and on December 6, 1993 Mr. Carr received, a letter rejecting the Ku Klux Klan application to erect its cross. A copy of that letter is attached hereto and incorporated herein as Exhibit 5.

32. On December 9, 1993, counsel for the Plaintiffs met with counsel for the Defendants, and the Plaintiffs filed a Notice of Appeal and Request for an Expedited Hearing.

33. On December 10, 1993 the State sent, and on December 13, 1993 the Plaintiffs received, a letter waiving statutory time constraints and agreeing to an expedited

hearing.

34. To date, no hearing has been held and the denial stands.

Count One

35. By refusing to allow the Plaintiffs to erect their cross on Capitol Square, the Defendants (a) have violated the guarantees of freedom of expression and free exercise of religion secured under the First and Fourteenth Amendments to the Constitution of the United States; (b) have deprived the Plaintiffs of the equal protection of the laws and due process of law secured under the Fourteenth Amendment to the Constitution of the United States; and (c) have engaged in conduct that constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

Count Two

36. By denying a Plaintiff a permit to hold a rally on January 15, 1994, the Defendants (a) have violated the guarantees of freedom of expression and assembly secured under the First and Fourteenth Amendments to the Constitution of the United States; (b) have deprived the Plaintiffs of the equal protection of the laws and due process of law secured under the Fourteenth Amendment to the Constitution of the United States; and (c) have engaged in conduct that constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

Count Three

37. By billing the Plaintiffs and refusing to retract the billing for security costs related to the rally, the Plaintiffs

for security costs related to the rally, Defendants (a) have chilled and violated the guarantees of freedom of expression and assembly secured under the First and Fourteenth Amendments to the Constitution of the United States; (b) have deprived the Plaintiffs of the equal protection of the laws and due process of law secured under the Fourteenth Amendment to the Constitution of the United States; and (c) have engaged in conduct that constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

Count Four

38. The conduct of the Defendants set forth above constitutes a continuing pattern of harassment and discriminatory conduct because of the political viewpoints of the Plaintiffs and (a) violates the free speech guarantees of the First and Fourteenth Amendments; (b) violates the equal protection of the laws and due process of the law guaranteed under the Fourteenth Amendment; and (c) is tantamount to a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States.

VI. Injury

51. The Plaintiffs have suffered and will continue to suffer irreparable injury by virtue of the Defendants' actions as described above, and the Plaintiffs are without an adequate legal remedy with which to address the aforementioned constitutional and other violations.

52. In addition, the plaintiffs have suffered injury by virtue of the conduct of the Defendants as described above, including personal expense and the necessary devotion of extraordinary time and attention by the Plaintiffs in order to secure their rights.

WHEREFORE, Plaintiffs request the following relief:

1. That a declaratory judgment issue, and a temporary retraining order, and preliminary and permanent injunctions be entered ordering the Defendants to permit the Plaintiffs to display their cross on Capitol Square.

2. That a declaratory judgment issue, and preliminary and permanent injunctions be entered directing the Defendants to permit the Plaintiffs to hold their January 15, 1994 rally.

3. That a declaratory judgment issue, and preliminary and permanent injunctions be entered voiding the billing for security services.

4. That the Plaintiffs be awarded damages in the amount of $1,000.00 for their expenditures and added time and attention necessary to secure their rights.

5. That the Plaintiffs be awarded their costs and attorneys' fees pursuant to 42 U.S.,C. Section 1988.

6. That the Plaintiffs have such other relief as the court deems proper.

Respectfully submitted,

Benson A. Wolman
(0040123)
Trial Attorney
3600 Olentangy River Road,
Bldg. 501
Columbus, Ohio 43214-3913

(614) 459-4140
(614) 459-4503 (facsimile)

David Goldberger (0010292)
Of Counsel
3600 Olentangy River Road,
Bldg. 501
Columbus, Ohio 43214-3913
(614) 459-4140
(614) 459-4503 (facsimile)

Attorneys for Plaintiffs

Of Counsel
Kevin Francis O'Neill
American Civil Liberties Union
of Ohio Foundation
1223 West Sixth Street
Cleveland, Ohio 44113
(216) 781-6278

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,	:	
Plaintiffs,	:	Case No. C2-93-1162
v.	:	Judge Graham

Capitol Square Review and Advisory Board. et al. : Magistrate Judge Abel

Defendants.

VERIFICATION OF COMPLAINT

STATE OF OHIO)
) SS:
county of cuyahoga)

I, Vincent J. Pinette, hereby assert that I have read the Complaint in this action and that the information set forth therein is true to the best of my knowledge and belief.

_____
Vincent J. Pinette

Sworn to me and signed via facsimile on this 17th day of December, 1993.

_____
Notary Public
Benson A. Wolman,
Attorney-at-Law
Notary Public - State of Ohio
My commission has no expiration date.
Section 147.03 R.C.

Plaintiff's Exhibit 1

INVOICE

OCTOBER 26, 1993

MICHAEL LOWE
P. O. BOX 2056
WACO TX 76703

CAPITOL SQUARE
REVIEW AND
ADVISORY BOARD

The Statehouse
Columbus, Ohio 43215
(614) 752-5209
FAX (614) 752-5209

Hon. Richard Finan
Chairman

Ronald T. Keller.
Executive Director

Christopher Cook
Assistant Attorney General
Legal Counsel

DESCRIPTION OF SERVICES

PARKING GARAGE REVENUE LOSES	$ 1,243.50
PROTECTIVE FENCING	9,179.00
LABOR COSTS - PLANNING, SETUP, TEARDOWN, MATERIALS AND CLEANUP	4,694.26
TOTAL AMOUNT DUE:	$15,116.76

TERMS: NET - 30 DAYS FROM INVOICE DATE

PLEASE MAKE CHECK PAYABLE TO:

CSRAB
OHIO STATEHOUSE
COLUMBUS, OH 43215

CC: VINCE PINETTE

PLAINTIFF'S
EXHIBIT 2

Capitol Square Review & Advisory Board
Phone: 614/752-9777 Fax: 614-/7525208
Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date: _____

Capitol Square Review and Advisory Board exercises supervision and control of Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Knights of the Ku Klux Klan

Representative's name, address, phone #: Vince Pinette, P.O. Box [ineligible] Cleve. Ohio 44102
216-631-0305
to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): Sat Jan 15 1994 2:00 - 4:00 p.m.

Event time: 2:00 & 4:00 p.m. Portion of Capitol Square to be occupied: north steps

Approximate number of persons to attend: 50

Type of event: Rally

Use: The user organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause.
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws. [NO PRICE ON FREE SPEECH]*
3. Bond Requirement: An optional bond may be required based on the nature of the event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.
4. Facility Protection: The user organization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.
5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of

the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.

6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.
7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited
8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be charged to the permit holder.
9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.
10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.
11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.

12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.

13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

*HAND WRITTEN IN BY
APPLICANT

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

C.S.R.A.B. only ___ ACCEPTED
Fee: $20.00 refundable _____ __ DENIED
Paid: $20.00 C.S.R.A.B. REPRESENTATIVE

I have read the above permit and agree to the terms and conditions specified therein

Date: 10/29/93
Check:

X_____
PERMIT APPLICANT

DATE 10-29-93

PLAINTIFF'S

Capitol Square Review & Advisory Board EXHIBIT 3
Phone: 614/752-9777 Fax: 614-/7525208
Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date: 11-29-93

Capitol Square Review and Advisory Board exercises supervision and control of Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Rabbi [illegible]

Representative's name, address, phone #: [illegible] to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): Dec. 8, 16, 93

Event time: N/A Portion of Capitol Square to be occupied: Grounds

Approximate number of persons to attend: N/A

Type of event: Seasonal Display

Use: The user organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause..
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws.
3. Bond Requirement: An optional bond may be required based on the [illegible] of the event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.
4. Facility Protection: The user organization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.
5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.
6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.
7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails,

sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited

8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be charged to the permit holder.
9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.
10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.
11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.
12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.
13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B.

against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

X ACCEPTED (RTK)

C.S.R.A.B. use only_____ __ DENIED

Fee: $20.00 C.S.R.A.B. REPRESENTATIVE

Paid: $20.00 I have read the above permit and agree to the terms and conditions specified

Date: 11/29/93 therein

Clerk: Cash

_____

PERMIT APPLICANT

DATE 11/29/93

PLAINTIFF'S EXHIBIT 4

Capitol Square Review & Advisory Board
Phone: 614/752-9777 Fax: 614-/7525208
Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date:

Capitol Square Review and Advisory Board exercises supervision and control of Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Knights of the Ku Klux Klan (Realm of Ohio)

Representative's name, address, phone #: Donnie A. Carr (216) 631-0305
P.O. Box 28705, Columbus, Ohio, 43228-0705
to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): 12-8-93

Event time: All day 24 hours Dec. 8 - 24, 1993 Portion of Capitol Square to be occupied: State House Lawn (Front)

Approximate number of persons to attend:

Type of event: Erect a Cross for Christmas

Use: The user organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause.
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws. (DOES NOT APPLY)

3.X Bond Requirement: An optional bond may be required based on the nature of the event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.

4. Facility Protection: The user organization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.

5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.

6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.

7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited

8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be

charged to the permit holder.

9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.

10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.

11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.

12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.

13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

C.S.R.A.B. only_____ ACCEPTED __ DENIED X

Fee: $20.00 nonrefundable C.S.R.A.B. REPRESENTATIVE

Paid: $20.00

Date: 1/29/93

I have read the above permit and agree to the terms and conditions specified therein

Check: Cash

_____

PERMIT APPLICANT[illegible]

DATE 11-29-93

PLAINTIFF'S
EXHIBIT 5

CAPITOL SQUARE
REVIEW AND
ADVISORY BOARD
The Statehouse
Columbus, Ohio 43215
(614) 752-9777
FAX (614) 752-5209

Hon. Richard Finan
Chairman

Ronald T. Keller
Executive Director

Christopher Cook
Assistant Attorney
General
Legal Counsel

December 3, 1993

Donnie A. Carr
P.O. Box 28705
Columbus, Ohio 43220-0705

Dear Mr. Carr:

Pursuant to Ohio Administrative Code 128-4-02(B), the Capitol Square Review and Advisory Board hereby gives notice that it must deny your application to erect a cross on the Statehouse Grounds between December 8, 1993 and December 24, 1993. This decision was made upon the

advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently rendered by the United States Supreme Court under the First Amendment to the United States Constitution.

In addition, I assume you are aware that we placed a telephone call to you earlier this week, seeking more information about the precise nature of the display you were requesting the Board to approve. We have not yet heard from you in response to that call.

Pursuant to Chapter 119, Ohio Revised Code and 128-4-04 of the Ohio Administrative Code, you are hereby advised that you may request a hearing on this matter. If your wish to request such a hearing, that request must be made in writing and received by the Capitol Square Review and Advisory Board within thirty (30) days of the date of mailing of this notice. This notice was mailed on the date indicated above.

You are further advised that you are entitled to appear in person, or by your attorney, or both, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for and against you.

In the event there is no request for such hearing

received within thirty (30) days of the date of mailing of this notice, the Capitol Square Review and Advisory Board will consider this matter closed.

Section 119.07, Ohio Revised Code, in part states:

> "Whenever a party requests a hearing in accordance with this section and Section 119.06 of the Ohio Revised Code, the agency shall immediately set the date, time, and place for such hearing and forthwith notify the party thereof. The date set for such hearing shall be within fifteen (15) days, but no earlier than seven (7) days, after the party has requested a hearing, unless otherwise agreed to by the agency and the party."

Sincerely,

RON KELLER
Executive Director
Capitol Square Review and
Advisory Board

Registered Mail
Return Receipt Requested

CERTIFICATE OF SERVICE
omitted in printing

IN THE STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Vincent J. Pinette, et al.,	:	
	:	
Plaintiffs,	:	Case No. C2-93-1162
	:	
v.	:	
	:	
	:	Judge Graham
	:	
Capitol Square Review and Advisory Board, et al.,	:	
	:	
	:	
Defendants.	:	

STIPULATIONS OF FACT

The parties, through their undersigned counsel, have agreed to submit the following stipulations of fact in order to facilitate resolution of plaintiffs' motion for temporary restraining order and preliminary injunction. The parties have agreed that to the extent these stipulations reference or quote from any documents, if these stipulations are in tension with or otherwise inconsistent with the text of any such document, these stipulations do not purport to override the text of any such document. Although these stipulations are intended to facilitate resolution of this matter, the parties have agreed

that they are not necessarily exhaustive of the factual record to be presented to this Court at the hearing in the form of affidavits or testimony, though the parties have agreed between themselves to make a good-faith effort to limit the amount of testimony, if any, that will be necessary to resolve this matter. If affidavits are submitted to the Court for purposes of presenting evidence in this matter, the parties have reserved all of their rights to object to the admissibility or the use of such affidavits on any defensible legal grounds.

1. Counsel for all parties have agreed and have so represented to this Court that the hearing on plaintiffs' motion for temporary restraining order and preliminary injunction that is scheduled for December 20, 1993, will address only the claims raised in Count One of Plaintiffs' Complaint.

2. Plaintiff Vincent J. Pinette is the Chief Executive Officer of the Knights of the Ku Klux Klan (Ohio Realm). Plaintiff Donnie A. Carr is the Unit Coordinator for Columbus, Ohio of the knights of the Ku Klux Klan (Ohio Realm). Plaintiff Knights of the Ku Klux Klan (Ohio Realm) is an unincorporated association whose members reside in the State of Ohio.

3. Defendant Capitol Square Review and Advisory Board is the state board chartered under Section 123.022 of the Ohio Revised Code that regulates the use of the Capitol Square.

4. Defendant Ronald T. Keller is the Executive Director of the Capitol Square Review and Advisory Board. Defendant Daniel Shellenbarger is the spokesperson for the Board. Defendant Richard H. Finan, an Ohio State Senator, is the chairperson of the Board.

5. The parties stipulate that venue is proper in this Court.

6. The Capitol Square, which is defined by law in Section 123.022(I) of the Ohio Revised Code, comprises an entire city block in downtown Columbus, Ohio, located south of Broad Street, north of State Street, east of High Street, and west of Third Street.

7. The Capitol Square is owned by the State of Ohio.

8. The Capitol Square is the seat of Ohio state government and is the site of the Ohio Statehouse, which is Ohio's state capitol building.

9. The Ohio Statehouse is the building in which the Ohio House of Representatives and the Ohio Senate meet in official session to carry out the duties constitutionally conferred upon the legislative branch of Ohio's state government.

10. The Governor and certain of the statewide elected officials also have offices in the Ohio Statehouse, and other offices are located there as well.

11. The Ohio Statehouse has been continually located on the Capitol Square for well over a century, since its construction was originally completed in 1861.

12. The Ohio Statehouse is a large rectangular building that centers the Capitol Square. A much taller rotunda rises above the middle of the rectangular building and is ordinarily topped by the United States and Ohio flags. An annex building is attached to the Statehouse on its eastern side. On its western side, the area between the Ohio

Statehouse and High Street is one city block long and approximately 240 feet wide.

13. The Ohio Statehouse is a distinctive building in the center of downtown Columbus, which stands as one of the outstanding and unusual examples of classical Doric architecture in the entire United States.

14. The Ohio Statehouse is the dominant feature of the Capitol Square. It is plainly and unavoidably visible from every vantage point upon the Capitol Square.

15. The Capitol Square Review and Advisory Board was created by the enactment of Senate Bill 381, which took effect on January 15, 1993.

16. The Board is charged in Section 123.022 of the Ohio Revised Code with specific powers and duties, among which are to operate the Capitol Square and to exercise sole authority in regulating all uses of the Capitol Square.

17. The Board has implemented its statutory mandate in part by adopting administrative rules pursuant to Chapter 119 of the Ohio Revised Code. Those rules became effective on October 29, 1993, after receiving final approval from the Joint Committee on Agency Rule Review. Those rules constitute Chapter 128 of the Ohio Administrative Code.

18. The Board meets at times and in a manner as the Board may prescribe.

19. Between meetings of the Board, the Executive Director conducts the ordinary and everyday affairs on behalf of the Board.

20. In recent years, certain displays have been placed upon the Capitol Square for limited periods during the month of December.

21. For the past several years, the displays placed upon the Capitol Square for limited periods during the month of December have included a Christmas tree and a free-standing Hanukkah menorah, which is a nine-branch candelabrum that serves as the primary visual symbol of the Jewish holiday of Hannukah and that has both religious and secular significance.

22. Defendants represent to this tribunal that to the best of their knowledge upon reasonable efforts made to ascertain the facts, no permit has previously been sought or granted to erect a Latin cross Upon the Capitol Square as part of these displays.

23. In recent years, Capitol Square has been the site of numerous assemblies.

24. On November 18, 1993, the Board met and voted not to permit any displays upon the Capitol Square during the month of December, 1993. This vote was invalid under the governing statute, Section 123.022(C) of the Ohio Revised Code, as it was not approved by five members of the Board.

25. Numerous public officials and private citizens communicated to the Board their disagreement with the action taken by the Board at its November 18, 1993 meeting. The Board also sought and received advice from counsel about the legal ramifications of that action.

26. On November 23, 1993, the Board met and voted to approve the displays of a Christmas tree and a

menorah upon the Capitol Square.

27. On November 29, 1993, Rabbi Capland submitted an application for a permit to display a menorah upon the Capitol Square from December 8-16, 1993. The permit application that was submitted by Rabbi Capland describes the type of event as a "Seasonal Display." See Exh. 3 (attached). The application was granted the same day.

28. On November 29, 1993, Donnie Carr submitted an application on behalf of the Knights of the Ku Klux Klan (Realm of Ohio) for a permit to display a cross upon the Capitol Square from December 8-24, 1993. The permit application that was submitted by ME. Carr describes the type of event as to "Erect a Cross for Christmas." See Exh. 4 (attached).

29. On December 3, 1993, Executive Director Keller denied the application for a permit to erect a cross upon the Capitol Square.

30. In a letter faxed to Mr. Carr on December 3, 1993, Executive Director Keller stated that the decision to deny the permit requested to erect a cross upon the Capitol Square "was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently rendered by the United States Supreme Court under the First Amendment to the United States Constitution." The letter also set forth relevant information about the right of administrative appeal that is provided to an applicant by Ohio law under Chapter 119 of the Revised Code. See Exh. 5 (attached).

31. On December 9, 1993, Benson A. Wolman submitted a Notice of Appeal to the Board on behalf of his client, the Knights of the Ku Klux Klan, seeking administrative review of the decision to deny the permit requested to display a cross upon the Capitol Square. The submission also requested an expedited appeal and hearing on the issue. See Exh. 6 (attached).

32. In a separate letter directed to counsel for the Board, also dated December 9, 1993, Mr. Wolman provided further information about the proposed display of a cross upon the Capitol Square. Mr. Wolman indicated that the cross "would be approximately ten feet high, six feet across, made from 2 x 6 lumber, painted white, secured upright by a free-standing tripod, and accompanied by a sign, readable from a distance, 'This cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property.'" Mr. Wolman also stated in the letter that "some matters, such as the contents of the sign, are open to negotiation." See Exh. 7 (attached).

33. On December 10, 1993, Executive Director Keller notified Mr. Wolman that the Notice of Appeal as submitted was defective under the governing administrative rules. He waived any such defects, however, except to require that Mr. Wolman submit immediately the "concise statement of the reason the appeal should be granted" required under the governing rules as an essential foundation for proceeding upon the administrative appeal. See Exh. 8 (attached).

34. In the December 10, 1993 letter to Mr. Wolman, Executive Director Keller also noted that he was waiving all time constraints otherwise imposed upon the

administrative appeal process by Ohio statute, in order to permit an immediate hearing upon the administrative appeal once Mr. Wolman submitted the required statement of the reason the appeal should be granted. See id.

35. In the December 10, 1993 letter to Mr. Wolman, Executive Director Keller also noted that the Board had never before received a request for "an administrative hearing relating to the issuance of a permit order," and thus had never before arranged for or conducted any such administrative hearing. See id.

36. On December 13, 1993, Mr. Wolman noted the Board's "prompt response" and submitted to the Board on behalf of his clients a "concise statement of the reasons the appeal should be granted." The statement sets forth the applicant's claim that the denial of the permit has "no basis in law or fact" and is contrary to various rights asserted by the applicant under the United States and Ohio Constitutions. See Exh. 9 (attached).

37. At the close of business on December 13, 1993, Mr. Wolman transmitted a letter to the counsel for the Board, seeking to arrange a mutually convenient time for the requested administrative hearing and offering to discuss possible stipulations to simplify the matter for resolution. In that same letter, Mr. Wolman also sought to obtain various specified documents from counsel for the Board for use in this proceeding. See Exh. 10 (attached).

38. On December 14, 1993, the Board retained attorney Keith S. Mesirow of Columbus to serve as hearing examiner in order to conduct an administrative hearing on this matter as provided in Section 119.09 of the Revised Code, and notified Mr. Mesirow to be prepared to conduct a hearing as scheduled by agreement between the parties, but

possibly as soon as Friday, December 17, 1993.

39. Also on December 14, 1993, counsel for the Board provided Mr. Wolman with certain documents responsive to the requests made in the letter received from Mr. Wolman at the close of business on December 13, 1993.

40. Also on December 14, 1993, counsel for both parties agreed to meet on December 15, 1993, in an effort to reach agreement on procedures and stipulations to facilitate a prompt resolution of this matter.

41. On December 15, 1993, and again on December 16, 1993, counsel for both parties met and discussed possible stipulations and procedures to facilitate and expedite the resolution of this matter. Counsel ultimately reached agreement upon the stipulations as set forth here.

42. On December 16, 1993, the denial of the permit application for the Knights of the Ku Klux Klan to erect a cross upon the Capitol Square was set for an administrative hearing, pursuant to Chapter 119 of the Revised Code, to be held at 2:00 p.m. on December 17, 1993. Under state law, the hearing examiner is empowered to issue a written report setting forth his findings of fact and conclusions of law and a recommendation of the action to be taken by the agency. See Exh. 11 (attached).

43. A Christmas tree has been displayed upon the Capitol Square from December 7, 1993 to the present and remains on display currently. A menorah was displayed upon the Capitol Square from December 8, 1993 until December 16, 1993 and is no longer on display there.

44. In recent years, and again this year, a large

Latin cross composed of white lights has been displayed throughout the holiday season on all four sides of a privately owned building known as the LeVeque Tower, one of the tallest buildings in Columbus, which is located one block northwest of Capitol Square.

Respectfully submitted,

BENSON A. WOLMAN
(0040123)
Trial Attorney
DAVID GOLDBERGER
(0010292)
Of Counsel
Moot, Copes & Stanton
3600 Olentangy River Road
Building 501
Columbus, Ohio 43214-3913
(614) 459-4140
(614) 459-4140

COUNSEL FOR PLAINTIFFS

RICHARD A. CORDRAY
(0038034)
Trial Attorney
CHRISTOPHER S. COOK
(0053067)
ANDREW S. BERGMAN
(0054582)
Of Counsel
OH Attorney General's Office
State Office Tower
30 East Broad Street
Columbus, Ohio 43215-3428
(614) 466-5026

COUNSEL FOR DEFENDANTS

Capitol Square Review & Advisory Board EXHIBIT 3
Phone: 614/752-9777 Fax: 614-/7525208
Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date: 11-29-93

Capitol Square Review and Advisory Board exercises
supervision and control of
Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Rabbi [illegible]

Representative's name, address, phone #: [illegible]
to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): Dec. 8, 16, 93

Event time: N/A Portion of Capitol Square to be occupied: Grounds

Approximate number of persons to attend: N/A

Type of event: Seasonal Display

Use: The us organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause..
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws.
3. Bond Requirement: An optional bond may be

required based on the [illegible] of the event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit. C.S.R.A.B. has the discretion to waive this bond requirement.

4. Facility Protection: The user organization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.

5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.

6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.

7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited

8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be charged to the permit holder.

9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.

10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.

11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.

12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.

13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

X ACCEPTED (RTK)

C.S.R.A.B. use only _____ __ DENIED

Fee: $20.00 C.S.R.A.B. REPRESENTATIVE

Paid: $20.00 I have read the above permit and agree to

Date: 11/29/93 the terms and conditions specified therein

Clerk: Cash

_____

PERMIT APPLICANT

DATE 11/29/93

Capitol Square Review & Advisory Board EXHIBIT 4

Phone: 614/752-9777 Fax: 614-/7525208

Statehouse, Columbus, Ohio 43215

APPLICATION FOR
PERMIT TO USE STATEHOUSE GROUNDS

Date:

Capitol Square Review and Advisory Board exercises supervision and control of Capitol Square pursuant to 123.02 O.R.C.

Capitol Square Review and Advisory Board hereby grants permission to:

Name of Group: Knights of the Ku Klux Klan (Realm of Ohio)

Representative's name, address, phone #: Donnie A. Carr (216) 631-0305
P.O. Box 28705, Columbus, Ohio, 43228-0705
to occupy and use Capitol Square subject to the terms and conditions below:

Date and time (set-up & clean up included): 12-8-93

Event time: All day 24 hours Dec. 8 - 24, 1993 Portion of Capitol Square to be occupied: StateHouse Lawn (Front)

Approximate number of persons to attend:

Type of event: Erect a Cross for Christmas

Use: The user organization agrees that, during the terms of this permit, assigned areas shall be operated under the following procedures:

1. Administrative Fee: A $20 administrative fee will be assessed for the use of any portion of the Capitol Square facilities. Checks may be made payable to: Capitol Square Review and Advisory Board. The board, at its discretion, may waive fees for just cause..
2. Prescribed Activities: The user organization shall not permit any act inconsistent with or in violation of local, state, or federal laws. **(DOES NOT APPLY)**

3.X Bond Requirement: An optional bond may be required based on the nature event. The bond amount will be determined by the Capitol Square Review and Advisory Board (C.S.R.A.B.) to protect damage to the property incurred during the term of this permit.

C.S.R.A.B. has the discretion to waive this bond requirement.

4. Facility Protection: The userorganization shall maintain Capitol Square facilities in a reasonable manner during the terms of this permit, keeping it clean, sanitary, and free of debris. After termination of this permit, Capitol Square areas shall be returned to C.S.R.A.B. in the same condition as prior to the event.
5. Security/Maintenance: C.S.R.A.B. security or maintenance personnel will be used as agreed upon by the board and permit applicant. All service charges will be billed to the permit holder prior to the date of the event. If any additional charges are incurred during the event, the permit holder will be billed at the completion of the event.
6. Vehicles/Structures: No equipment, apparatus, machine or vehicle is permitted on Capitol buildings or grounds without the express written permission of the C.S.R.A.B.
7. Signs, Banners, Flags: The use of stickers or labels, cellophane pressure sensitive tape, screws, nails, sticks, poles, or any other mounting technique for displaying signs, banners, or flags which adversely affects the structural, [illegible], or decorative condition of the Capitol buildings or any permanent structure on the premises be prohibited
8. Supplemental Accommodation: Supplemental accommodation such as, but not limited to: electricity, water, litter control, and outdoor facilities may be provided by C.S.R.A.B. These items will be charged to the permit holder.
9. Interference: Use of Capitol Square facilities shall only be done in a manner so as not to interfere or compete with the normal business proceedings of the Ohio General Assembly. On the days of each

proceedings, hours of public activities shall be held to the maximum extent possible during lunch hours from 11:00 A.M. to 1:00 P.M. or after 4:30 P.M.

10. Sound Equipment: Use of sound projection equipment shall be in compliance with local noise ordinances and used in a manner so as to not interfere with the proceedings of the General Assembly or other activities being conducted on Capitol Square.

11. Electrical Hook-up: There is a $5.00 charge for electrical hook-up. please make your check payable to the Capitol Square Review and Advisory Board and submit it to C.S.R.A.B. before the date of the event.

12. Food/Beverages: No food or beverages, or merchandise shall be sold or dispensed on Capitol Square Grounds without the express written consent of C.S.R.A.B. No transport vendors are permitted to use the Capitol Square facilities. Food and beverage dispensing shall be in accordance with all state, and federal laws.

13. Liability: The user organization shall indemnify and hold harmless the State of Ohio and C.S.R.A.B. against any and all claims, demands, actions or causes of actions, together with any and all losses, costs or related expenses asserted by any person or persons for bodily injury, death or property damages resulting from or arising out of this permitted use of Capitol Square.

CAPITOL SQUARE REVIEW AND ADVISORY BOARD

___ ACCEPTED

C.S.R.A.B. only _____ _X_ DENIED

Fee: $20.00 nonrefundable

C.S.R.A.B. REPRESENTATIVE

Paid: $20.00
Date: 1/29/93
Check: Cash

I have read the above permit and agree to the terms and conditions specified therein.

PERMIT APPLICANT
DATE 11-29-93

EXHIBIT 5

CAPITOL SQUARE
REVIEW AND
ADVISORY BOARD

The Statehouse
Columbus, OH 43215
(614) 752-9777
FAX (614) 752-5209

Hon. Richard Finan
Chairman
Ronald T. Keller
Executive Director

Christopher Cook
Assistant Attorney
General
Legal Counsel

December 3, 1993

Donnie A. Carr
P.O. Box 28705
Columbus, Ohio 43220-0705

Dear Mr. Carr:

Pursuant to Ohio Administrative Code 128-4-02(B), the Capitol Square Review and Advisory Board hereby gives notice that it must deny your application to erect a cross on the Statehouse Grounds between December 8, 1993 and December 24, 1993. This decision was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently rendered by the United States Supreme Court under the First Amendment to the United States Constitution.

In addition, I assume you are aware that we placed a telephone call to you earlier this week, seeking more information about the precise nature of the display you were requesting the Board to approve. We have not yet heard from you in response to that call.

Pursuant to Chapter 119, Ohio Revised Code and 128-4-04 of the Ohio Administrative Code, you are hereby advised that you may request a hearing on this matter. If you wish to request such a hearing, that request must be made in writing and received by the Capitol Square Review and Advisory Board within thirty (30) days of the date of mailing of this notice. This notice was mailed on the date indicated above.

You are further advised that you are entitled to appear in person, or by your attorney, or both, or you may present your position, arguments, or contentions in writing, and that at the hearing you may present evidence and examine witnesses appearing for and against you.

In the event there is no request for such hearing received within thirty (30) days of the date of mailing of this notice, the Capitol Square Review and Advisory Board will consider this matter closed.

Section 119.07, Ohio Revised Code, in part states:

> "Whenever a party requests a hearing in accordance with this section and Section 119.06 of the Ohio Revised Code, the agency shall immediately set the date, time, and place for such hearing and forthwith notify the party thereof. The date set for such hearing shall be within fifteen (15) days, but no earlier than seven (7) days, after the party has requested a hearing, unless otherwise agreed to by the agency and the party."

Sincerely,

RON KELLER
Executive Director
Capitol Square Review and
Advisory Board

Registered Mail
Return Receipt Requested

EXHIBIT 6

MOOT, COPE &STANTON
A Legal Professional Association

3600 Olentangy River Road
Columbus, Ohio 43214-3913
(614) 459-4140
Telefax
(614) 459-4503

Phillip R. Moots
Jon M. Cope
Elizabeth M. Stanton

Wanda L. Carter
Benson A. Wolman
Catherine A. Cunningham

9 December 1993

VIA FACSIMILE 752-5209 AND FIRST CLASS MAIL
Capitol Square Review and Advisory Board
Ronald T. Keeler, Executive Director
Hon. Richard H. Final, Chairperson
The Statehouse
Columbus, Ohio 43215

RE: Appeal of December 3, 1993 denial of Permit Application of Knights of the K Klux Klan to display cross; Request for Expedited Hearing

Dear Mr. Keeler and Senator Finan:

This constitutes a Notice of Appeal from, and a request for an expedited appeal and hearing on, the December 3, 1993 denial of the November 29, 1993 Application by the Knights of the K Klux Klan (Ohio Realm) for a Permit to Use Statehouse Grounds to display a cross from December 8, 1993 through December 24, 1993.

This notice has been discussed with your counsel and is being sent simultaneously to counsel via facsimile and first class mail.

Respectfully submitted,

Benson A. Wolman
David Goldberger
Attorneys for Appellant

cc: Christopher Cook, Assistant Attorney General
Andrew Sutter, Assistant Attorney General
Richard A. Cordray, State Solicitor
Lee Fisher, Attorney General
Donnie A. Carr, Unit Coordinator, Knights of the KKK (Ohio)
Vincent J. Pinette, Grand Titan, Knights of the KKK (Ohio)

EXHIBIT 7

MOOT, COPE & STANTON
A Legal Professional Association
Phillip R. Moots

3600 Olentangy River Road
Columbus, Ohio 43214-3913
(614) 459-4140
Telefax
(614) 459-4503

Jon M. Cope
Elizabeth M. Stanton

Wanda L. Carter
Benson A. Wolman
Catherine A. Cunningham

9 December 1993

VIA FACSIMILE 752-5209 AND FIRST CLASS MAIL
Christopher Cook, Assistant Attorney General
Andrew Sutter, Assistant Attorney General
Richard A. Cordray, State Solicitor
Lee Fisher, Attorney General
30 East Broad Street
Columbus, Ohio 43266-0410

Re: Capitol Square Review and Advisory Board Denial of Permit Application of Knights of the Ku Klux Klan to display cross; Request for Expedited Hearing

Gentlemen:

It was a pleasure meeting with you this afternoon. Subsequent to that gathering, we met with Mr. Pinette and Mr. Carr.

With regard to the reference to a telephone call in the December 3, letter from Ron Keller, I advised Chris Cook by telephone this afternoon, and this is to confirm that, Mr. Pinette and Mr. Carr state that:

1) There was, indeed, a call from Mr. Shellenbarger to the Cleveland number;

2) Mr. Pinette was out of town and Mrs. Pinette gave the caller the number of the National headquarters in Arkansas to call for further information;

3) Mr. Carr was apprised of the call on the same day and returned the call to Mr. Shellenbarger on that same day;

4) When he called Mr. Shellenbarger, Mr. Carr indicated who he was and that he had the requested information; he was informed by a secretary that Mr. Shellenbarger was out and that she did not know when he would return; and

5) Mr. Pinette and Mr. Carr are not aware of any call to the National headquarters, if one was made, nor of any return call to the Cleveland number.

In response to your inquiry as to the description (including the size, shape, material, and manner of securing the display), Mr. Carr advises us that the cross would be approximately ten feet high, six feet across, made from 2 x

6 lumber, painted white, secured upright by a free-standing tripod, and accompanied by a sign, readable from a distance, "This cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." It is our understanding that some matters, such as the contents of the sign, are open to negotiation.

Accompanying this letter is a copy of the Notice of Appeal and Request for Expedited Hearing which we discussed today; it was sent via facsimile and first class mail to the Board today. If you have any suggestions as to alternative means of resolving this matter, please let us know.

Cordially,

Benson A. Wolman
David Goldberger

enclosure: Notice of Appeal

cc: Vincent J. Pipette
Donnie A. Carr

3157\004\LTRCOO01.BAW

EXHIBIT 8

December 10, 1993

Mr. Benson A. Wolman
Moots, Cope & Stanton
3600 Olentangy River Road
Columbus, Ohio 43214-3913
Telefax: (614) 459-4503

VIA FACSIMILE AND ORDINARY MAIL

CAPITOL SQUARE
REVIEW AND
ADVISORY BOARD

The Statehouse
Columbus, OH 43215
(614) 752-5209
FAX (614) 752-5209

Hon. Richard Finan
Chairman

Ronald T. Keller
Executive Director

Christopher Cook
Assistant Attorney
General
Legal Counsel

Re: Notice of Appeal from Denial of Permit to Display Cross on Capitol Square

Dear Mr. Wolman:

The Board has received your Notice of Appeal and Request for Expedited Hearing, both of which are based on the previous denial of a permit for your client to display a cross on the Statehouse grounds from December 8 to December 24 of this year.

The Notice of Appeal that you have submitted is not in compliance with O.A.C. 128-4-04, which is understandable because the rule only took effect on October 29, 1993, after receiving final approval from the Joint Committee on Agency Rule Review. We are waiving those requirements except that in order to process your appeal

promptly and effectively, the Board not need to receive from you the "concise statement of the reason the appeal should be granted" as set forth in that Rule. I would ask you to submit that statement to the Board as quickly as possible, preferably by immediate facsimile transmission.

Our counsel has undertaken a review of the applicable laws and regulations governing the procedures for an administrative appeal. (Please understand that this body has never before received a request pursuant to statute for an administrative hearing related to the issuance of a permit order). R.C. 119.07 states that an agency is to set the date, time, and place of a hearing "within fifteen days, but not earlier than seven days, after the party has requested a hearing." It also appears, however, that an agency has discretion under the statute to waive these time constraints if requested to do so by the party giving notice.

In view of the sensitive timing of the particular matters at issue here, counsel has advised us that the Board should waive the seven-day requirement and try to schedule an administrative hearing as soon as possible. Accordingly, we do waive the seven-day requirement as provided in the statute. As soon as the Board receives a brief statement of the reasons why your client believes that the initial denial of the permit was improper and thus that the appeal should be granted, we will immediately schedule an expedited hearing as you have requested. In the meantime, we will continue to take all necessary steps to prepare and schedule a proper administrative hearing in compliance with the governing statutes.

Sincerely,

RON KELLER

Executive Director
Capitol Square Review
and Advisory Board

EXHIBIT 9

MOOT, COPE &STANTON
A Legal Professional Association

3600 Olentangy River Road
Columbus, Ohio 43214-3913
(614) 459-4140
Telefax
(614) 459-4503

Phillip R. Moots
Jon M. Cope
Elizabeth M. Stanton

Wanda L. Carter
Benson A. Wolman
Catherine A
Cunningham

9 December 1993

VIA FACSIMILE 752-5209 AND FIRST CLASS MAIL
Capitol Square Review and Advisory Board
Ronald T. Keeler, Executive Director
Hon. Richard H. Final, Chairperson
The Statehouse
Columbus, Ohio 43215

RE: Appeal of December 3, 1993 denial of Permit Application of Knights of the K Klux Klan to display cross; Request for Expedited Hearing

Dear Mr. Keeler and Senator Finan:

Your letter that was transmitted after hours Friday was received by me this morning. We appreciate the prompt response. Following is a concise statement of the reasons the appeal should be granted:

1. The denial violates the guarantees of the freedom of expression and free exercise of religion secured under the First and Fourteenth Amendments to the Constitution of the United States and similar provisions of the Constitution of the State of Ohio;

2. The denial deprives the appellant of the equal protection of the laws guaranteed under the Fourteenth Amendment and similar provisions of the Ohio Constitution;

3. The denial deprives the appellant of due process of law secured under the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Ohio as well as of other rights guaranteed under the Constitution of the United States and the Constitution of the State of Ohio;

4. The denial constitutes a bill of attainder and an ex post facto law under Article I, Section 10 of the Constitution of the United States and similar provisions of the Constitution of the State of Ohio;
and

5. The denial states, and there is, no basis in law or fact that would justify denying the permit.

Not yet having received a copy of the rules, policy or minutes of the board reciting the underlying authority for the action of the Executive Director, the appellant does not waive the right to raise any further constitutional or other bases upon which the ruling may be challenged.

Sincerely,

Benson A. Wolman
David Goldberger
Attorneys for Appellant

BAW:smk

cc: Christopher Cook, Assistant Attorney General
Andrew Sutter, Assistant Attorney General
Richard A. Cordray, State Solicitor
Lee Fisher, Attorney General
Donnie A. Carr, Unit Coordinator, Knights of the KKK (Ohio)
Vincent J. Pinette, Grant Titan, Knights of the KKK (Ohio)

EXHIBIT 10

MOOT, COPE &STANTON
A Legal Professional Association

3600 Olentangy River Road
Columbus, Ohio 43214-3913
(614) 459-4140
Telefax

Phillip R. Moots
Jon M. Cope
Elizabeth M. Stanton

Wanda L. Carter
Benson A. Wolman

(614) 459-4503

Catherine A.
Cunningham

9 December 1993

VIA FACSIMILE 752-5209 AND FIRST CLASS MAIL
Christopher Cook, Assistant Attorney General
Andrew Sutter, Assistant Attorney General
Richard A. Cordray, State Solicitor
Lee Fisher, Attorney General
30 East Broad Street
Columbus, Ohio 43266-0410

Re: Capitol Square Review and Advisory Board Denial of Permit Application of Knights of the Ku Klux Klan to display cross; Request for Expedited Hearing

Gentlemen:

Please contact me so that we may arrange a mutually agreed upon time for the hearing and to discuss possible stipulations to simplify the matter.

Also, if you will not be arranging for a stenographic transcript of the appeal hearing, please apprise me reasonably in advance.

In addition, please supply via facsimile (or, if voluminous, we will pick up) copies of:

1. OAC-128-04;

2. the original board or other policy, statement,

minutes, or guidelines which the borad appeared to have adopted regarding holiday or other displays;

3. the present board policy, statement, minutes or guidelines which the board has adopted relative to holiday or other displays;

4. any other policies or materials, statements, minutes or guidelines which pertain to holiday or other displays and the Ku Klux Klan or any other individuals or groups; and

5. all materials related to the Lubavitch menorah application (and disposition) this year and in prior years and any other application (and disposition) for the use of Capitol Square for holiday or other displays.

Thank you for your assistance in these matters.

Cordially,

Benson A. Wolman
David Goldberger
Attorneys for Appellant

BAW:smk

cc: Vincent J. Pinette
Donnie A. Carr

3157\004\LTRCOO02.BAW

Attorney General
LEE FISHER

December 16, 1993

Benson A. Wolman, Esq
Moots, Cope & Stanton
3600 Olentangy River Road
Columbus, Ohio 43214-3913

Re: Schedule of Administrative Hearing

Dear Mr. Wolman:

The expedited administrative hearing that you requested on behalf of the Knights of the Ku Klux Klan has been scheduled for Friday, December 17, 1993 at 2:00 p.m. The hearing will be conducted in the North Hearing Room of the Statehouse Senate Building (the Ohio Statehouse Annex).

Thank you for your cooperation in this matter.

Very truly yours,

CHRISTOPHER S. COOK
Assistant Attorney General
(614) 466-2980

CSC:elk

cc: Donnie A. Carr
Vincent Pinette
David Goldberger

DEFENDANTS' EXHIBIT C
[Reprinted in brief in opposition to writ of certiorari. p. RA 17]

DEFENDANTS' EXHIBIT D

[Reprinted in brief in opposition to writ of certiorari. p. RA 19]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VINCENT J. PINETTE, ET AL.,	:	
	:	
Plaintiffs,	:	
v.	:	CASE NO. C2-93-1162
	:	
CAPITAL SQUARE REVIEW AND ADVISORY BOARD, et al.,	:	JUDGE GRAHAM
	:	
Defendants.	:	

AFFIDAVIT

STATE OF OHIO, COUNTY OF FRANKLIN, SS:

Dr. Dennis Anderson, being first duly cautioned and sworn, deposes and states as follows:

1. I am the President of Trinity Lutheran Seminary, a seminary of the Evangelical Lutheran Church in America, located at 2199 E. Main Street, Columbus, Ohio 43209.

2. I have been the President of Trinity Lutheran Seminary for the past four years, from January, 1990, to the present, December 20, 1993

3. I attended Gustavus-Adolphus College and earned the undergraduate degree of a Bachelor of Arts in 1959.

4. I attended the Lutheran School of Theology at Chicago, Illinois from 1959 to 1963 and earned a Master of

Divinity degree in 1963.

5. I received further post-graduate training at the Austin Presbyterian Theological Seminary from 1964 to 1965.

6. Prior to becoming President of Trinity Lutheran Seminary, I was a Bishop with the Lutheran Church, Nebraska Synod. I held this position for twelve years.

7. I have been a Pastor in the Lutheran Church for thirty (30) years.

8. It is my opinion, confirmed by widely acknowledge and accepted historical research, that the cross is a wide spread religious symbol found in both Old and New Worlds. The source of the cross is in remotest antiquity as a symbol of the life of homo religious. It is used in artistic, scientific, mathematical, architectural, geographic and cosmological fields. While it is one of the most ancient symbols, the cross is a symbol par excellence of Christianity itself as well as of Christ its head.

9. It is my opinion that in American religious use and culture the Latin Cross is the most common and constitutes the primary symbol of Christianity.

10. For Christians, the cross is a sign evoking memory and knowledge of a specific historical event, the death of Jesus of Nazareth whom Christians adknowledge as the Christ, Lord and Saviour. From the first century on, Christians have understood the cross as connected both to the mystery of creation and redemption. It is a symbol thus not only of the death of Jesus but of the Resurrection of Jesus and of God's saving acts in history.

11. It is because of a historical event, the death of Jesus of Nazareth, crucified at Golgotha - that the cross is endowed with transcendent significance. This is reflected in the fact that early Christian theologians began the work of re-interpreting pagan (non-Christian) uses of crosses in light of Christian theology. Among such theologians were Justin Martyr and Tertullian. By the end of the 6th Century crosses marked the altars of Eastern and Syrian Churches and by the end of the 7th Century crosses decorated all "monuments" in both the East and the West. Thus in both Eastern and Western Europe, the Middle East, and the Americas the cross is considered inseparable from the New Testament witness to Jesus as Lord and Saviour.

12. The cross in American culture and religious culture, and the Latin cross in particular, is thus not only a religious symbol, but "sectarian" in that it has primary reference to Jesus and Christianity.

13. The Latin cross, as the unmistakably inherent symbol of Christianity, transcends any specific holy season or holiday such as Christmas or Easter however, it is most specifically associated with Good Friday and Easter because of the crucifixion and resurrection. It is not considered a Christmas symbol as such. It is a symbol of Jesus and the Christ.

Further Affiant sayeth naught.

_____

Dr. Dennis Anderson

Subscribed and sworn to me this 20th day of December, 1993.

_____

Notary Public

Susan C. Strait
Notary Public - State of Ohio
My commission expires
April 30, 1996

A. Yes, it is.
Q. What is the mission of the Knights of the Ku Klux Klan?
A. First, I would like to clarify, the name Ku Klux Klan is a term which is in the public domain. It is used by many different groups. At last count, I believe there were 96 separate groups using that term. Our group, the Knights of the Ku Klux Klan, is a law-abiding group. We are totally opposed to any violence against any other person, whether it be because of their race or because of their religion, but our goals are the establishment or the reestablishment of a Christian government in the United States of America, and we do believe that each race should be separate to rise to their own level. We believe in fundamental family values. Basically, everything that our country was founded on, the original Constitution, that's what we are for.
Q. Did you apply for the permit that is at issue

in this matter?
A. Yes, I did.
Q. Why did you apply for it?
A. I applied for the permit after hearing that the -- I
believe it was on the 18th of November, I heard on the
television that the Capitol Square Review and Advisory
Board had denied or had passed a ruling where they were

[43]

going to allow no religious displays whatsoever on the
statehouse grounds. After that, the next day or
subsequent thereafter, maybe a couple of days, they had
said that there was a great deal of pressure upon them,
and that they had reversed the decision and would allow
the menorah, allow the tree, and the reason they had
stated before on their banning on everything was that they
were afraid that the Klan would attempt to erect a cross.
MR. CORDRAY: Your Honor, we would object to some
of this testimony. Much of that last answer is clearly
based on hearsay. It is not clear to me that the witness
has personal knowledge -
THE COURT: Well, he said he read it in the

paper, so that is first-hand knowledge of what he read.
Overruled. Go ahead.
MR. CORDRAY: Thank you, Your Honor.
THE WITNESS: As I stated, the reason that they had not wanted to allow any of displays was that they were afraid that the Klan would -- if I remember the direct quote -- it was embarrass the city, that they would not - the Klan, meaning us, would not lose another chance to embarrass the city.
MR. CORDRAY: Your Honor, may we stipulate that this testimony is being offered to demonstrate Mr. Carr's understanding rather than for the truth of the matters

[44]

asserted?
THE COURT: Well, Mr. Cordray, I am going to let it in, and I will sort out how it can be used.
MR. CORDRAY: Thank you, Your Honor.
THE COURT: Go ahead.
THE WITNESS: After that, after conferring with my superiors in the organization, we had decided that since we were being excluded by the city or the state, the Capitol Square Review and Advisory Board, that we would

attempt to obtain a permit to erect a cross for the Christmas season. At no time did we stipulate that we wanted the cross to be part of the holiday, quote unquote, display that was there. We said on the application, it states erect cross for Christmas. It doesn't specify that we put the cross beside the menorah, beside the tree. I applied, I believe, on the 29th for the permit, and I believe that was the same day that the permit for the menorah was also filed, and then subsequently the permit was denied. I was made aware of that through the media before I got the registered mail.

BY MR. WOLMAN:

Q. Do you care where the cross would be displayed on the statehouse ground?

A. Absolutely not, not as long as it is not segregated as in behind a wall or something where it can't be seen,

[47]

A. Yes, I believe he is.

Q. Thank you. Proceed.

A. He came out from the building at a dead run, came into the press conference, broke through the reporters that were there, and in a very irate, very agitated manner, stated this is illegal, you cannot have a

press
conference here, you don't have a permit. When Mr.
Pinette tried to ask him if he needed a permit to make a
press statement, Mr. Shellenbarger totally ignored the
question, kept repeating that you have to stop this right
now, you can't speak any longer, so we said we would go
get a permit. Mr. Shellenbarger -- as we turned to go
inside the building to get the permit, Mr. Shellenbarger
reached out, grabbed Mr. Pinette's jacket and if to say
you can't go there. I told him to please remove his
hand. This was on the videotape of the local television
program. He did so. As we were going inside to get the
permit, the reporters were asking Mr. Pinette questions.
Every time he answered a question, Mr. Shellenbarger said
that is another $20 permit you owe us.
By the time we had gotten to the inside of the
Capitol Square Review and Advisory Board, I think we were
up to like $80 because Mr. Pinette had actually spoken
four different words.
When we filed for the permit, Mr. Shellenbarger

-- for the press conference that we were going to have right then, Mr. Shellenbarger stated that, well, this is going to take a week for us to act on this permit for you to hold this press conference, which we were holding at that instant.

Also, subsequent to that, when I personally applied for the permit for the cross, we went into the Capitol Square Review and Advisory Board. Mr. Shellenbarger wasn't there at that time. I spoke with the secretary, obtained the permit, filled it out.

Q. Excuse me, you obtained the permit or the application?

A. The application for the permit, excuse me. I obtained the application for the permit, I subsequently filled it out. As I came back in to get the permit, I noticed that there were cartoons out of a newspaper, I imagine, or perhaps someone had drawn them, and the cartoons were -- a brief synopsis of it, there was a drawing of a robed klansman, there were two windows as if teller windows. Over one was the sign which read applicants for permits to assemble. The other sign said idiots with constitutional rights. The person was pointing -- the person in the cartoon was pointing to the

door with the idiots, saying I think you need to go next door. I saw several cartoons that were blown up to about,

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I would say, one foot by one foot, and one which was at least 2 foot by 3 foot on several of the offices, and I felt that was prejudicial against us.

MR. CORDRAY: Objection, Your Honor, I am not sure I quite understood the relevance of that last portion of the statement to the defendants in this case. Maybe I merely misunderstood the testimony.

THE COURT: As I understand it, he's simply citing evidence to support his belief that the authorities charged with the duty of issuing these permits were biased against his organization.

MR. CORDRAY: All right.

THE COURT: The Court will let it in for that purpose.

THE WITNESS: Also, at that same time, while I was there obtaining the application for the permit, Mr. Shellenbarger did enter as I was turning over the application. He once again came in very irate, what's going on, what's going on, seeing that it was me.

I explained to him that we were filing for a permit to erect a cross. Mr. Shellenbarger took the application fee, he made a very big show of writing "nonrefundable" on the $20 application fee in very large letters as if to say you just wasted $20, and we got a copy of the permit -- or the application for the permit,

[50]

and as I said, that has led me to believe that the Capitol Square Review and Advisory Board is prejudiced against our particular group, and any motion or any petition that we might file.

BY MR. WOLMAN:

Q. How many copies of that cartoon did you see?

A. I personally saw at least three or four, and like I said, one was at least 2 foot by 2 foot, it was very large.

Q. Mr. Carr, what was it you wanted to erect on the day -- for the period of time that you indicated on the permit application?

A. It was a cross which was to be 10 foot high, 6 foot cross member, painted white. It would be held by a free standing tripod. On that also would be a cardboard disclaimer which would have inscribed on it that this has

been erected with private funds without the authorization of the state, and that it was to be there as an expression of the holiday season, and as an expression that we believe that all religious views should be expressed. Nowhere on the cross was it to say erected by the Ku Klux Klan or anything of that nature.

Q. Was the so-called disclaimer sign fixed in your mind or was it subject to negotiation?

A. It was subject to negotiation. Whatever would work,

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we were willing to work with the Capitol Square Review and Advisory Board or any other body as to whatever would fulfill what they believed the obligations would be for the disclaimer.

Q. What is the cross? Is it a symbol of religion?

A. Obviously the cross has a religious connotation. To us, meaning the Knights of the Ku Klux Klan, it has many other applications. It is a symbol to us of freedom, a symbol of -- it is hard to put into words. To us, it is a sacred symbol, but it is also a symbol of going against tyranny, a symbol of freedom. We believe that it is one

of the best symbols that exemplify what we believe in, and
we have used it for 128 years.
Q. A symbol against tyranny in the manner that Jesus of
Nazareth opposed tyranny?
A. That, and also the cross originated -- the Ku Klux
Klan's use of the cross originated from the early Scottish
clans in Scotland in the 1300s which used the cross as a
symbol to rally the clans together to fight against their
English oppressors.
MR. WOLMAN: That is all the questions I have,
Your Honor.
THE COURT: All right. Who will cross-examine?
MR. CORDRAY: I will, Your Honor.
THE COURT: Mr Cordray

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- - -

CROSS-EXAMINATION

BY MR. CORDRAY:
Q. Mr. Carr, I am Richard Cordray on behalf of the
state.
I believe you indicated that your position is
that you are a unit coordinator for the Ku Klux Klan?
A. Yes, that is right, Knights of the Ku Klux Klan.
Q. Is there any other name for your position?

A. The term in Klan parlance would be the exalted
cyclops.
Q. Exalted cyclops. That would be a unit coordinator,
is that correct?
A. Yes.
Q. Mr. Pinette has been referred to in the complaint as
the chief executive officer in his affidavit of the Ku Klux Klan. Is there another name for his position?
A. He is the regional coordinator.
Q. Is there another name in Klan parlance?
A. In Klan parlance he would be the grand titan.
Q. The grand titan?
A. Yes.
Q. You stated in response to some questions by Mr.
Wolman that one of the central purposes of your organization is, and I quote you, to establish a Christian

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government in America, is that correct?
A. To return the government of the United States to its
original foundations which we believe does have Christian
connotations, yes.
Q. So in fact, as you said earlier, part of your objective is to establish a Christian government in America, is that correct?
A. As I said, to return the government to as it was
originally founded.
Q. You also said in response to the

question --

MR. WOLMAN: Asked and answered, Your Honor.

THE COURT: If you have an objection, stand and say I object.

MR. WOLMAN: Object, Your Honor.

THE COURT: Would you read the question back?

(Question read).

THE COURT: I am going to sustain the question. It is argumentative. Go ahead.

BY MR. CORDRAY:

Q. Is it correct that in response to the question from Mr. Wolman, and I suppose the record will reflect this, you stated that part of the objective of your organization is to establish a Christian government in America?

A. Yes.

[54]

Q. Thank you. In your view, would the erection of a cross on Capitol Square help to advance the objective of your organization of establishing a Christian government in America?

A. No.

Q. Would the denial of an opportunity to display your cross on Capitol Square retard your objective of attempting to establish a Christian government in America?

A. I believe the denial of the application would adversely affect our right to display symbols, whether it be Christianity or any other symbol that we decide to erect.

Q. Would it have any impact on your purposes of attempting to return the government of the United States more toward Christian principles?

A. You mean on a national level?

Q. Even on a local level here in Ohio, central Ohio.

A. I'm sorry, I don't quite follow exactly what you mean.

Q. Let me rephrase the question.

A. Please.

Q. You have stated in response to questioning that part of the objectives of your organization are to establish a Christian government in America, and you have elaborated to return the government of America more along its

[55]

fundamental Christian origins.

A. Correct.

Q. My question to you is: Is your request to have a cross erected on Capitol Square during the Christmas season part of the efforts by which you are attempting to achieve those objectives?

A. Yes, I would believe that it is a part -- yes, to erect the cross would be to help us return to the Christian values, yes.

Q. You have also indicated in response to questions from Mr. Wolman that -- let me try to be clear on this, and I hope you will clarify -- that you don't really want this cross to be part of the state's holiday seasonal display, is that correct?

A. No, I said that I did not -- we did not specify that it be part of the holiday display. I didn't say that we didn't want it to be, I said that we did not specify that it would be.

Q. Do you have a preference in that regard?

A. Not at all. Anywhere on the -- anywhere on the ground. That is what it said in the application, erect a cross for Christmas. It didn't say erect it with the holiday display.

Q. Do you prefer that the cross stand alone, or would you prefer --

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A. Yes.

Q. Did you receive a bill?

A. No, we didn't.

Q. Have you paid any money or been asked to pay any

money since then on that occasion?
A. For that particular -
Q. Yes.
A. No.
Q. Did that press conference go forward? I believe you said --
A. Not on the statehouse grounds. We were forced to move on to the public sidewalk.
Q. You have also indicated here today that part of the display that you seek on the Capitol Square would be a disclaimer sign, is that correct?
A. That's correct.
Q. What would that sign say?
A. As I said, it is open to discussion. The gist of the disclaimer would be that it has been erected by private individuals, and that it would not constitute acceptance or that it was being condoned by the state, and that we believe that it was put there as an expression of the Christmas season or the holiday season and as an expression that all religious views should be shared equally in public forums.

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Q. In fact I believe you-stated., and in fact the sign, as I understand it, would state specifically, that this is for the purpose of expressing respect for the holiday

season, is that correct?
A. As I said, the sign is open -- the sign has not been written yet, sir. It is open to discussion.
Q. I would simply reference in the stipulation of fact number 32, the content as stated to the board is for the purpose of expressing respect for the holiday season.
That is in harmony with your views?
A. Yes.
Q. In your original application for a permit, was there any mention of any such sign or disclaimer?
A. No.
Q. When did you decide to add a disclaimer?
A. I knew personally all along that a disclaimer would need to be placed on the cross as we did not want to have the cross displayed without a disclaimer on it.
Q. But you didn't indicate that to the board when you submitted the permit application?
A. No. The only -
Q. That is fine.
MR. GOLDBERGER: He should be permitted to explain his answer.
THE COURT: We are going to have one lawyer for

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understand to be the quintessential and principal and central religious symbol of the Christian faith, and

you
indicated that in fact the cross has been used by your
organization for 128 years. Is that correct?
A. Yes. I would also like to stipulate our organization
is the Knights of the Ku Klux Klan. When we refer to Ku
Klux Klan, it could be one of various groups.
Q. But I believe you testified, sir that your
organization -- that was your characterization -- has been
using the cross for 128 years?
A. Yes.
Q. That dates back to what date?
A. 1865 is when the Ku Klux Klan was formed; so -
Q. And in what manner has your organization used the
cross over the years?
A. Well, I can only speak for obviously the time that I
have been in the movement, but historically, the cross has
been used, as I said, as a symbol of freedom, as a symbol
of trying to unite our people. We try to unite our people
under the cross. We try to use the cross as a symbol of
freedom from tyranny. The cross was also incorporated in
the confederate battle flag, which I don't know if you are
familiar with that or not.
Q. I am.

A. But the cross is incorporated in that also, and the

THE COURT: Yes.

Q You're an ordained cantor of the Jewish faith?

A Yes, I am.

Q Where did you obtain your ordination?

A I was ordained at the Jewish Theological Seminary in New York in 1982.

Q Is that the same seminary where Rabbi Berman was ordained

A Yes.

-- as a rabbi?

A As a rabbi, as a graduate of the rabbinical school of that seminary, and I'm a graduate of the cantorial school. And both cantors and rabbis serving congregations are considered to be ministers according to the guidelines set down by the state.

Q Does the state permit you to perform marriages?

A Yes.

Q By your education and training, are you familiar with the precepts of Judaism?

A Yes, I am.

Q Are you familiar with the bible?

A Yes.

Q And with Talmudic matters?

A Yes.

MR. WOLMAN: We ask that he be

considered an expert,

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your Honor.

THE COURT: Is there any objection to that,

Mr. Cordray?

MR. CORDRAY: We have no objection, your Honor.

THE COURT: Very well.

Q Cantor, can you tell us, in your own words, what the

menorah means?

The menora is a religious symbol. It is used in

conjunction with fulfilling the obligations incumbent upon

Jew for the celebration of the festival of Hanukkah.

Q By a menorah, we are here discussing, I take it, the

nine-branch candelabrum?

A Yes.

Q As opposed to other kinds of candelabra?

A Yes, definitely.

Q How do you feel about the menorah?

A Well, it's a I think --

MR. CORDRAY: Your Honor --

THE COURT: Just one moment. Yes, Mr. Cordray.

MR. CORDRAY: Objection. I'm not sure how the

witness knows how to respond to the question.

THE COURT: His own subjective feelings would not be

relevant. Sustained. Go ahead. Rephrase the question.

Q Cantor, do you regard the menorah as a symbol of the

25 Jewish faith?

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1 A I regard the menorah as a religious symbol. It is
2 important in its use to perform a religious obligation,
3 and I take exception to the suggestion that it is not a
4 religious symbol.
5 Q Do you know of any other faiths that use that nine-branch candelabrum menorah?
7 A I am not aware of any, though I don't consider that
8 there are some faiths which are extremely welcoming of the
9 rituals of other faiths. It is possible that there might be
10 another faith which does.
11 Q But you re no. aware of any?
12 A I am not aware of any.
13 Q Are you familiar with the so-called Jewish star?
14 A Yes, I am.
15 Q Is that a symbol of the Jewish faith?
16 A I consider that to be a purely secular symbol.
17 Q In what way is it a secular symbol?
18 A We see that symbol adorning various different objects
19 and people. But it is not used in conjunction with any
20 religious obligations.
21 Q Is it used as the symbol of any governments?
22 A Yes. It is used as the symbol of the government of the

state of Israel. But again, in that regard, I don't see that as invalidating my previous statement.

Q Is it used for commercial products, such as a wine?

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Q What's the difference between festival and season?

A The festival is eight days. The season is something of a longer time and it actually suggests other seasons which are celebrated at this time of the year with which there would certainly be no connection of the Hanukkah.

Q But, for example, in this case Rabbi Capland was permitted to erect a menorah on the capitol grounds from December 8 to December 16, which as I understand it coincides with the festival season taken in the limited sense of the dates that are inclusive of the Hanukkah festival; is that correct?

A The festival of Hanukkah is eight days long. I take some exception to the use of the word season, but this is a court, and that word, you know --

Q I understand. But the festival runs from December 8 to December 16, at least it did this year; is that correct?

A Yes.

MR. CORDRAY: I have no further

questions, your
18 Honor.
19 THE COURT: Anything further, Mr. Wolman?
20 MR. WOLMAN: Just two, your Honor.

- - -

22 REDIRECT EXAMINATION
23 BY MR. WOLMAN:
24 Q Cantor Chomsky what do most Jews do with the menorah?
25 A They put candles in it as appropriate, as prescribed by

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1 our tradition, and they recite blessings which state as part
2 of the blessings that we were commanded to perform this act.
3 Blessings such as this make this into very much a ritual act.
4 Based on your experience and training, do most Jews regard
5 this as a religious symbol?
6 A Yes.
7 MR. WOLMAN: Thank you.
8 THE COURT: Anything further, Mr. Cordray?
9 MR. CORDRAY: No, your Honor.
10 THE COURT: Cantor Chomsky, thank you very much.
11 You may step down.
12 Next witness.

Jerry Bunge

13 MR. GOLDBERGER: Jerry Bunge Your Honor, we're
14 calling Mr. Jerry Bunge to the stand and he's on his way

into the room. I'm a little perplexed as to what to do when one finds a preliminary injunction consolidated with a trial on the merits. I get nervous about what's in and what's out. Why don't you take the stand.

THE COURT: Sir, step right up here and be sworn.

MR. GOLDBERGER: Basically, the purpose of his testimony is to describe very, very briefly the kinds of events that occur outside of the courthouse -- or, excuse me, outside of the Capitol Square. The Court made reference to some of these kinds of events.

THE COURT: Let's have the clerk swear the witness.

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Mr. Goldberger, you may proceed.

- - -

JERRY BUNGE

called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GOLDBERGER:

Q Would you please state your name, Mr. Bunge.

A Jerry Bunge, B-U-N-G-E.

Q Your occupation?

A I'm an attorney and project director of Citizens for Justice, a statewide gay-lesbian bisexual political

activist group
Q Can you tell me if you've had any occasion to work with
an organization called the Stonewall Union
A Yes, I have. I have been a member since approximately
1985, and I was the president of the board in the 1987-88
year, I believe.
Q And what is the Stonewall Union?
A The Stonewall Union is a central Ohio gay-lesbian bisexual advocacy group.
Q has the stonewall union ever had occasion to have
gatherings in the vicinity of the state capitol?
A Yes. From the early 80s, I believe the first was in
1981, through approximately 1988, the Stonewall Union held a

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rally on the statehouse square every year in June.
Q And were you present at those rallies?
A I was present at several of them.
Q Were you present at the rallies in the late 1980s?
A Yes.
Q Can you tell me, to the best of your recollection,
about how many people attended the rallies in 1988?
A I believe in 1988 there were somewhere between five-and
seven thousand people present on the square.
Q That would be on the west side of the statehouse?
A Yes, the west lawn.

Q And was that event held pursuant to a permit?
A Yes
Q Who granted that permit?
A I don't know exactly who granted it. It was whoever the appropriate statehouse authorities were.
Q At the time?
A At the time.
MR. GOLDBERGER: I have no further questions your Honor.
THE COURT: Mr. Cordray, any questions?
MR. CORDRAY: Briefly, you Honor.

- - -

Joseph Cooper [80]

THE COURT: Sir, I'm having trouble hearing you and I'm sure others are also.
A 519 Pin Cherry Lane in Worthington.
THE COURT:
Q What's your organization?
A I'm a potter.
Q Are you a member of organizations related to that profession?
A Yes,I belong to the Ohio Designer Craftsmen.
Q Are you familiar with the Capitol Square grounds?
A I am.
Q In what way related to Ohio Designer Craftsmen might

you be familiar with Capitol Square grounds?
A In the past, I'm not sure of the exact years, the festival that's now called the arts festival and is now held on Front Street or thereabouts, was held on the state grounds.
Q And, in the course of that, were there many booths?
A Yes. The booths extended probably from the west and on the south side around onto the High Street side and then to the entrance on the Broad Street side.
Q Were those booths there for several days?
A Yes.
MR. WOLMAN. Thank you. Pardon me. Excuse me, your honor.
Q Are you familiar with United Way displays of any kind on

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the statehouse square?
A I do recall that they erected a thermometer, a gauge.
Q A campaign thermometer?
A Yes.
Q And was that free standing?
A I think it was on the northwest corner of the building.
Q Of the building or the lawn?
A I think it was actually on the building, that's my recollection. I'm fairly certain. This is something you could get a picture of in the Columbus Dispatch.

Q That was left up for substantial period of time.
I would suppose.
Q Do you recall seeing it there more than once?
Yes.
MR. WOLMAN: Thank you
THE COURT: Mr. Cordray, any questions?
MR CORDRAY: Yes, sir.

- - -

CROSS-EXAMINATION

BY MR. CORDRAY:

Q When the Ohio Arts Festival was held at the Capitol Square, sir, and booths were erected, were they erected in conjunction with the festival and therefore were to be populated during the festival by individuals showing their wares and individuals coming to look at or perhaps buy wears?

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A Yes, that's true.
Q You spoke of the United Way thermometer that you believe you have seen displayed at Capitol Square on prior occasions.
A Yes.
Q What did that signify to you?
A It was a gauge of the contributions and the progress towards their goal.
Q And would you take that display as signifying that the

state government was willing to endorse and promote the
United Way's fund raising campaign.
A I really can't answer that question. I'm not trying to
evade it, but I have no opinion on that.
Q I see. The fact that the state permits the United Way
to erect their thermometer and let people know how they're
doing in their fund raising drive, would you have any
reaction as to whether you thought that meant that the state
approved of and was willing to support United Way?
MR. WOLMAN: Objection, asked and answered.
THE COURT: Overruled.
THE WITNESS: I would say that if I had heard that
the state did not allow it, that that would indicate a
disapproval. So I think you could infer that its presence
was in support of the activity.
MR. CORDRAY: Thank you, sir.
No further questions, your Honor.

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THE COURT: Anything further, Mr. Wolman?
MR. WOLMAN: Nothing further, you Honor.
THE COURT: Mr. Cooper, thank you very much, sir.
You may step down.
Any further witnesses on behalf of the

plaintiff?

THE WITNESS: Can I stay in here now?

THE COURT: You're excused now, sir. Thank you very much. Can you remain in the courtroom.

THE WITNESS: Yes

THE COURT: There is no objection; is there?

MR. CORDRAY: No, objection, your Honor.

THE COURT: Yes sir. You may find a seat in the back of the courtroom.

Any further witnesses on behalf of the plaintiff?

MR. GOLDBERGER: Mr. Keller.

THE COURT: I didn't hear you.

MR. GOLDBERGER: We'd like to call the executive director as if on cross, your Honor.

THE COURT: Sir, would you step forward and be sworn.

THE COURT: Mr. Cordray?

MR. CORDRAY: We understand Mr. Keller is being called as if on cross-examination.

THE COURT: That's correct. That's what counsel stated. All right.

Mr. Goldberger, you may proceed.

A Yes, sir, that's correct.

Q Are many permits granted for -- well, is more than one or two permits a year granted for use of the Capitol Square

grounds on the west side of the building each year?
A Yes, sir.
Q Is there -- can you tell me about how many have been granted this year, estimate?
A Many, many dozens.
Q Many dozens. Can you just kind of, off the top of your head, recall the names of any of the groups that have done it?
A Central Ohio Transit Authority.
THE COURT: Keep your voice up, sir. Central Ohio Transit Authority.
A Central Ohio Transit Authority, the Ohio Environmental Protection Agency, the Department of Administrative Services
Q Any private groups, sir?
A Private groups -- there have been some that have used the statehouse property.
Q Can you tell us was there a meeting on -- when was the first meeting to consider the use of the Capitol Square grounds for Christmas-related displays this year?
A This past summer.
Q When was the first meeting in which the particular
A displays were discussed in November?
A Do that again, please.

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cross at that time?
A I remember being asked if the members of the Ku Klux

Klan had taken out a permit.

Q What was your answer to that question?

No, they had not.

Q What else was said about it?

A Well, that's about all I recollect.

Q Isn't it true sir, that the decision was made at that meeting not to permit the Christmas tree, or not to have the Christmas tree, during this Christmas season?

A Yes.

Q Isn't it also true that there was a decision not to grant a permit for display of the menorah during this Christmas season?

A There was a vote taken in open session not to permit the use of a Christmas tree or the menorah.

Q Isn't it true that one of the reasons that was given during that open session was that if those things were displayed, it might prompt groups such as the Ku Klux Klan to erect a cross?

A In open session I don't recollect that being said.

Q Was it said somewhere else? Was it said in closed session?

MR. CORDRAY: Objection your Honor. I think that counsel is now asking about executive session that would have

involved advice of counsel and discussions that were privileged between counsel and the board members.

THE COURT: All right. Mr. Goldberger, please rephrase your question so as to exclude any conferences with counsel.

Q Was there any lawyer at that first session?

A Yes.

Q Who was it?

A Christopher Cook.

Q Was the subject matter of that session the Ku Klux Klan cross?

MR. CORDRAY: Excuse me, your Honor.

MR. GOLDBERGER: I think we're entitled to that information

MR. CORDRAY: When he says that session --

THE COURT: Just a moment, just a moment, just a moment. Any communications that the board made to counsel for the purpose of receiving legal advice would be privileged.

MR. GOLDBERGER: Thank your Honor.

THE COURT: If they conducted deliberations with counsel present, that is not privileged. So phrase your question appropriately.

Q Was there any discussion amongst the members of the board

or any statements to you personally by a member of the board, or that you overheard that was not to counsel or did

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Q Did any member make a public announcement afterward as to why the vote was taken to exclude the menorah and not to have the tree?

A There were interviews by members of the media when members of the board responded to their questions.

Q And were you present at any of those interviews?

A No.

Q Did you give any of those interviews?

A I was approached by one or two members of the media, yes.

Q Did you not tell them that the reason that the menorah and the Christmas tree were not being displayed that year was to avoid having to give permission for the cross?

A I don't recollect that I said that.

Q You recollect not saying it, sir?

A No.

Q I assume that --

A I don't recollect one way or the other.

MR. GOLDBERGER: I have no further questions, your Honor -- I have one additional question.

Q There was a subsequent meeting; was there not? Wasn't there a meeting last week?

A There was a meeting last week, on the 16th of December.
Q Can you tell me what happened at that meeting with
respect to the Ku Klux Klan cross?
A Nothing.

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Q Did the board,or did you receive a letter from Governor
Voinovich, Vern Riffe, Stanley Aronoff and others concerning
the Christmas displays?
A Yes, we did.
Q Do you have a copy of that letter here in the courtroom?
A No, I don't.
Q Does anyone? What was the sum and substance of that
letter, as long as we don't have -- I assume we don't have a
copy.Do we have a copy of that letter here in the courtroom?
MR. CORDRAY: Objection, your Honor. Is this
question being directed to the witness-s or to the courtroom
or --
THE COURT: First it was addressed to the witness--
MR. GOLDBERGER: He said --
THE COURT: -- and his question was: What's the sum
and substance of the letter that was received.
THE WITNESS: Basically, it was a letter from the
above-mentioned individuals asking the board to

rescind
their decision on holiday displays.
MR. GOLDBERGER: I have no further questions,
your Honor.
THE COURT: Do the plaintiffs have any further
witnesses?
MR. CORDRAY: Your Honor?
THE COURT: Yes, Mr. Cordray.

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are you aware of any free-standing displays that have been
permitted to be erected and left on Capitol Square separate
and apart from an event or a rally or an assembly of any kind?
A No.
MR. CORDRAY: No further questions, your Honor.
THE COURT: Mr. Goldberger, you may cross-examine.

CROSS-EXAMINATION

BY MR. GOLDBERGER:

Q How long have you been employed by the Capitol Square
Review Board, sir?
A Earlier this year.
Q So you're basically -- when you know of no other
activities, you're speaking from fairly short duration of
employment, sir?
A The Capitol Square Review and Advisory Board has only

recently gained the control of the complete facility known as Capitol Square.

Q You indicated that one of the reasons, or the reason that you turned down this application was because it appeared to you to be a religious symbol that was being requested; isn't that correct?

A That's correct.

Q And you also granted authorization for the display of a menorah on your own decision; isn't that correct?

[98]

A Yes, that's correct.

Q Is it your position that the menorah -- display of the menorah is less religious and therefore not an establishment of religion?

A It has come to my attention that, in courts, both the Christmas tree, or the holiday tree and the menorah have been ruled secular objection.

MR. GOLDBERGER: We have no further questions, your honor.

THE COURT: Anything further, Mr. Cordray?

MR. CORDRAY: Nothing, your Honor.

THE COURT: All right, Mr. Keller. Thank you very much, sir. You may resume your seat.

Do the defendants have any further witnesses?

MR. CORDRAY: We would like to call,

your Honor,
Vincent Pinette to the stand.
MR. GOLDBERGER: I will be handling the objections
on this witness, your Honor.

Vincent Pinette

- - -

VINCENT PINETTE

called on behalf of the defendants, having been first duly
sworn, testified as follows:

EXAMINATION

BY MR. CORDRAY:

Q Sir, would you state your name and address for the

[99]

record, please?
A My name is Vincent Pinette, and my address is P.O. Box
620007, Cleveland, Ohio.
Q What is your position, sir?
A I am the regional coordinator, grand titan for the
Realm of Ohio, Knights of the Ku Klux Klan.
Q Sir, what is a realm, when you refer to the realm of Ohio?
A State.
Q That is merely your organization's parlance for the
State of Ohio?
A That's correct.
Q Mr. Pinette, why is it that your organization wanted to
display a cross on Capitol Square during the December month
of his year?

A Well, we felt that other entities were being repre-
sented, you know, such as the Christmas tree and the Jewish
menorah, as we are all aware here, so we felt we were most
certainly entitled to freedom of expression also and would
like to have seen the Christian cross represented up there.
Q Sir, do you understand the cross to be a holiday
seasonal symbol?
A Do I understand it to be? I guess it depends on from
whose eyes you are looking at it. It could be symbolic of
the holiday season depending on who you're asking the
question to.

[100]

Q And I'm asking the question to you, sir.
A Okay. Well, in my eyes I think it's got a good
representation of Christmas, yes, or the holiday season.
Q Sir, in Christian doctrine, as you understand it, does
the cross represent the crucifixion and resurrection of
Jesus Christ.
MR. GOLDBERGER: I object. I'm not sure that --
THE COURT: Sustained.
MR. CORDRAY: I'm sorry. On what basis was the

objection made and sustained?

THE COURT: Well, I'll tell you why I sustained it. I haven't heard anything that would qualify this gentleman as having any expertise in Christian doctrine. I'm not really sure how it's relevant to the issues in this case.

MR. CORDRAY: I see, your Honor. I'm attempting to ask as to the purpose that this gentleman understands he and others in his organization sought to erect a cross on Capitol Square and therefore, in addition to that, what significance that its display there would convey in their minds. And I think that that's certainly relevant on the issue of what this symbol --

THE COURT: I think he's answered the question. Let's move on to something else.

MR. CORDRAY: Could I ask the Court for back the original newspaper article that I handed up which is

[101]

Defendant's Exhibit C? May I approach the witness?

THE COURT: Yes.

Q Mr. Pinette, I'm handing you what has been marked as Defendant's Exhibit C. As you see, it's a newspaper article

from the Columbus Dispatch on Thursday, November 25, 1993,
in which you're quoted in particular at-the end of column
one, moving on to column two. Would you read that paragraph
into the record, pleases.
Second paragraph, or third paragraph?
Q I'm talking about the paragraph that is at the end of
the first column and carries over on to column two.
A Where I said the Klan doesn't have a problem with a
Christmas tree?
Q Yes, sir.
A Is that the quote you're referring to?
Q Yes, I am.
A He said, "But we feel if the Jews are going to have a
menorah, we should put up a symbol for our Lord, Jesus
Christ." Shall I read on?
Q I believe you just did. And did you in fact say that,
Mr. Pinette?
A I did feel that if the Jews were going to be able to
represent a menorah which we in the Klan feel is a religious
symbol for the Jewish belief I did say that I would like to
see the cross erected for our symbolism also -- our right to

[102]

expression.
Q Is that what you said in that paragraph, sir?

MR. GOLDBERGER: Your Honor, I think --

THE COURT: Just a moment. If you have an objection, stand and say I object.

MR. GOLDBERGER: I object. I believe it speaks for

THE COURT: Stop right there. If I want to hear argument on the objection, I'll ask you for it. You asked him if he made the statement contained in the newspaper article?

MR. CORDRAY: Correct. And I don't think I got a direct answer.

THE COURT: You never got an answer. Did you make the statement you're quoted as making in the newspaper cll article?

THE WITNESS: I was just going to ask --

THE COURT: Answer it yes or no. Did you make that statement or not?

THE WITNESS: Yes.

THE COURT: Now go ahead.

THE WITNESS: I made the statement.

Q Mr. Pinette, you belong to an organization known as the Knights of Ku Klux Klan. There was testimony earlier from Mr Mr. Carr that one of the central objectives of that organi-zation is -- and I quote his testimony -- "to establish a

Christian government in America." Would you agree that that

REPORT AND RECOMMENDATION OF
ADMINISTRATIVE HEARING EXAMINER
[Reprinted in appendix to petition for a writ of certiorari p. A27]

OPINION AND ORDER OF THE DISTRICT COURT

[Reprinted in appendix to petition for a writ of certiorari p. A13]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

Vincent J. Pinette, et al. :

v. : Judgment In A Civil Case

Capital Square Review and Advisory Board, et al. : Case Number: C-2-93-1162

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

__X__ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants shall issue a permit to the Knights of the Ku Klux Klan (Ohio Realm) to erect a cross on the Capitol Square for the remainder of the period from today's date until December 24, 1993.

December 21, 1993

Date

Kenneth J. Murphy

Clerk

Beverly J. Robinson

(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

VINCENT J. PINETTE, ET AL.,	:	
	:	
Plaintiffs,	:	
v.	:	CASE NO.
	:	C2-93-1162
CAPITAL SQUARE REVIEW AND	:	
ADVISORY BOARD, RONALD T.	:	JUDGE
KELLER, DANIEL SHELLENBARGER	:	GRAHAM
SENATOR RICHARD H. FINAN,	:	
	:	
Defendants.	:	

NOTICE OF APPEAL

Notice is hereby given that Defendants, Capital Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Senator Richard H. Finan, hereby appeal to the United States Court of Appeals for the Sixth Circuit from the December 21, 1993 Order of this Court granting Plaintiffs an injunction requiring Defendants to issue a permit to erect a cross on Capital Square for the remainder of the time between todays date (December 21, 1993) and December 24, 1993.

Respectfully submitted,

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COUNSEL FOR
DEFENDANTS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing notice of Appeal has been forwarded to Benson A. Wolman and David Goldberger, Moots, Cope and Stanton, 3600 Olentangy River Road, Suite 501, Columbus, Ohio 43214-3913, attorneys for Plaintiffs, via facsimile and the U.S. Mail, postage prepaid, this 21st day of December, 1993.

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MR. WOLMAN: We'll subsequently tender some evidence to that, your Honor. We'll move to the next tape. This is broadcast No. 5 which was aired on November 18, 1993.

THE COURT: Mr. Cordray?

MR. CORDRAY: Again, your Honor, not to suggest how anyone should proceed, but if we want to merely speed things along, we would stipulate that this is a relatively accurate transcript of the tape and perhaps he could merely question Mr. Cohen about whatever background Mr. Cohen needs to provide and we could move this along.

THE COURT: Well, I'd like to hear the tape.

MR. CORDRAY: Okay.

"Officials in charge of the Capitol grounds say they hate the Klan but there is nothing they can do to block the KKK from going ahead with plans to hold a January 15 rally protesting the Martin Luther King holiday.

"It's called the First Amendment rights of the United States Constitution.

"That is State Senator Richard Finan, head of

the
agency that controls the statehouse grounds. After the KKK
held a statehouse rally in October that featured 500 police
and highway patrol officers holding back a thousand anti-Klan
protestors, officials sent the Klan several bills to pay for
the extraordinary protection. They totalled more than
$100,000. Klan leaders refused to pay and for a while state

[30]

officials declared that meant the Klan would never get the
okay to hold a second rally. Now, though, after meeting with
their lawyer, officials, like Finan, are conceding they do
not have court precedence on their side.
"We would love to have a basis for denying the Klan
the right to come here. We explored ideas of they didn't pay
the bill, does that give us any defense? The bottom line
answer is 'no.'
"Reaction to the decision is fairly predictable.
Ohio Klan leader Vince Pinette from Cleveland says he's
delighted but not surprised.
"We knew that standing on that First Amendment,
God-given, inalienable, constitutional rights, that there
would be no way they could put a price tag on free

speech.

"And on the other side, critics of the Klan are upset. Keith Gilty, who's an OSU professor who helped organize the last protest against the Klan:

"I'm disappointed that the State is going to allow a group that advocates genocide to have public rallies on its grounds. If the Klan happened to be a group of so-called Palestinian terrorists or something of that sort, there's no way they'd ever be granted a permit to speak in public. The problem here is that apparently Ohio state officials are not willing to acknowledge what the Klan really is.

"There's an ironic twist to this story. At the same [31] time state officials were giving the green light to the Klan, they put up a red light to the traditional official state holiday tree and an unofficial Hanukkah menorah, both of which had graced the statehouse grounds for years. Senator Finan said he wanted to avoid having Columbus go through what Cincinnati went through last year, and may go through again this year.

"Last holiday season, after a tree and menorah were put up in a public square in the Queen City, the Klan went to

court for a ruling allowing them to erect a 15-foot tall cross. Vandals kept knocking it down, so city officials were later ordered to provide special police protection for the Klan project. Senator Finan says this year no holiday symbols will be allowed at the statehouse and that way the Klan won't get its symbol in the door either. It may seem strange that the Klan is being allowed to hold a second rally while mainstream religious symbols are barred. But Finan says the two situations are very different.

"We could keep the Ku Klux Klan off of the statehouse grounds. All we have to do is bar everybody else. We're not prepared to do that. It's a little easier to bar a holiday tree than it is to bar everybody from the statehouse.

"Bill Cohen at the Ohio Public Radio, Statehouse News Bureau."

Q Mr. Cohen, you heard that report. Is that a fair and

[32]

accurate representation of what was aired?

A Yes.

Q In your opening comments in that report, you said officials in charge of the Capitol grounds say that they hate the Klan but there is nothing they can do to block the

KKK.
Who are those officials?
A Well, I was referring generally to Senator Finan.
Q And what's his position, if you know?
A Chairman.
Q Is he chairman of the Capitol Square Review and Advisory Board?
A Yes.
Q And he is one of the defendants in this case.
THE COURT: Now, I have had the opportunity to scan the transcripts of the next three tapes, I believe, there are three more tapes. It appears that all of this has to do with the controversy surrounding the menorah and the Christmas tree and the cross. Some of it may indeed be relevant to this case but it doesn't deal with what was said at the October rally, and it doesn't contain any examples of the speech of the plaintiffs in this case.
And I just don't see any reason to take the time to listen to those tapes in view of Mr. Cordray's willingness to stipulate that the speakers said what they're quoted as saying in the transcripts. And you are stipulating that;

[33]

right, Mr. Cordray?
MR. CORDRAY: Yes, we are, your Honor.

THE COURT: I think we can speed things along. I can read these.

MR. WOLMAN: That's fine. Thank you, your Honor. Your Honor, we do wish to characterize those statements made or referred to by Mr. Cohen and his reports of statements where they aren't actually quoted --

THE COURT: All right.

MR. WOLMAN: -- as being admissions of defendants.

THE COURT: Anything further then of Mr. Cohen then?

MR. CORDRAY: I'm sorry, your Honor, I didn't follow that last comment. I thought Mr. Wolman said that he wanted to be able to characterize the statements made by Mr. Cohen as admissions of the defendants. If that's what he said, I would object to that. Maybe that's not what he meant to say.

THE COURT: Look, you don't want him to have to say that in every instance in which Mr. Finan says something on this tape, that he in fact said it. The Court will determine whether that represents any kind of admission. My only purpose now is to simply establish that counsel are in agreement that the tapes are accurate and the transcripts are

accurate, the people who are identified spoke the words they're quoted as saying. Whether they amount to any admissions against interest or what the legal significance of

[34]

those statements are is open to debate.

MR. CORDRAY: That's fine, your Honor. I think we're all clear on this.

MR. WOLMAN: Your Honor, we have no further questions but Mr. Cordray may well have with regard to -- there are points within the transcript where Mr. Cohen makes --

THE COURT: I will ask Mr. Cordray if he has any questions. I have a couple questions before we proceed.

Mr. Cohen, how long have you covered the statehouse?

THE WITNESS: Since 1976.

THE COURT: I suspect you've seen a lot of demonstrations at the statehouse?

THE WITNESS: Yes.

THE COURT: What kinds of groups have you seen demonstrate there with the apparent permission of the state?

THE WITNESS: Well, I've seen pro-choice demonstrations, pro-life demonstrations, I've seen all kinds of

labor
19 rallies, labor unions, the credit unions hold a rally. And
20 I believe we've seen several political candidates have rallies
21 on the statehouse steps. I have seen dozens and dozens of
22 different groups all hold rallies or impromptu press
23 conferences.
24 THE COURT: Any religious organizations?
25 THE WITNESS: Yes, there was a prayer day, there was

[35]
1 a -- it was called National Prayer Day about a year or two
2 ago on the statehouse steps.
3 THE COURT: Have you been present during any rallies
4 or demonstrations where there were protestors present who
5 registered their protest about what was being said?
6 THE WITNESS: I can't remember any specific examples
7 right now, but I'm pretty sure that I have. Perhaps not
8 major organized demonstrations, but at least critics of
9 whoever is holding the demonstration.
10 THE COURT: Have you been present for any rallies
11 where policemen or highway patrolmen, other security
12 officers, were required to be present?
13 THE WITNESS: With some political candidates, yes.
14 THE COURT: All right, sir.
15 Mr. Wolman, any further questions in light

of the
Court's questions?
MR. WOLMAN: In light of the Court's questions,
your Honor:

- - -

EXAMINATION

BY MR. WOLMAN:
Q I believe you stated before that you had attended the
October 23 rally.
A Yes.
Q During that rally, what was the conduct, if you observed

[89]

going to have her on the stand.
THE COURT: What are the exhibit numbers again?
THE WITNESS: 28 and 27.
MR. GOLDBERGER: Will counsel stipulate that they're
authentic documents?
MR. CORDRAY: Yes, and we will in fact have in the
courtroom the person who can speak most directly to them.
And I don't think Mr. Keller really can.
Q Mr. Keller, I would just like you to take a look at --
are there any notations of waivers of any provisions of those

documents -- on any provisions of those documents, hand-
written notations?
A On item 28, which is a permit for March for Jesus
apparently, the bond requirement appears to be waived.
Q Can you tell us --
A It says waived and initialed AC.
Q Can you tell me the date of the activity as it appears
on the permit?
A She waived -- apparently she waived the bond require-
ments on 5-11-92.
Q Take a look at the other document. Are there any
notations of waiver on that permit?
A Yes. Again, the bond requirement is not dated but
says waived and initialed. And then item 8 is waived and
initialed.

PLAINTIFFS' EXHIBIT 33

[Reprinted in brief in opposition to writ of certiorari p. RA11]

(5)

FILED
FEB 21 1995
OFFICE OF THE CLERK

No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF PETITIONER

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59pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE UNATTENDED DISPLAY ON GOVERNMENT PROPERTY OF A PURELY RELIGIOUS SYMBOL, SUCH AS A LARGE, LATIN CROSS, DIRECTLY IN FRONT OF A SEAT OF GOVERNMENT, SUCH AS THE OHIO STATEHOUSE, VIOLATES THE ESTABLISHMENT CLAUSE, EVEN IF SUCH DISPLAY IS SPONSORED BY A PRIVATE GROUP IN A PUBLIC FORUM?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 30 F.3d 676 (6th Cir. 1994) and is reprinted in the Appendix to the Petition for Writ of Certiorari ("App.") at A1-A12. The Sixth Circuit's opinion affirmed the December 21, 1993 Order and Opinion of the United States District Court for the Southern District of Ohio. The District court's opinion is reported at 844 F. Supp. 1182 (S.D. Ohio 1993) and is reprinted at App. A13-A26. The Report and Recommendation of the Administrative Hearing Examiner, adopted in full by the Capitol Square Review and Advisory Board, is reprinted at App. A27-A37.

The unreported opinion of the Sixth Circuit denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reprinted at App. A40-A42. The in-chambers opinion of Justice Stevens, sitting as Circuit Justice, denying Petitioners' request for an emergency stay of the district court's injunction pending appeal is reported at 114 S. Ct. 626 (Stevens, Circuit Justice 1993) and is reprinted at App. A38-A39.

STATEMENT OF JURISDICTION OF THE COURT

The decision of the Court of Appeals for the Sixth Circuit was entered on July 25, 1994. *See* App. A1. The petition for writ of certiorari was filed on October 24, 1994, and was granted on January 13, 1995. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Constitution of the United States, Amendment XIV, Section 1.

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

1. Respondents in this action, the Knights of the Ku Klux Klan (Ohio Realm) and two of their officers, brought this suit originally against the Capitol Square Review and Advisory Board, its executive director, spokesperson, and chairperson. Joint Appendix (J.A. 22-23). The lawsuit sought in effect to compel the State of Ohio to allow Respondents to erect a large, unattended Latin cross directly in front of the Ohio Statehouse during the Christmas season, between December 8, 1993 and December 24, 1993. (J.A. 26). Respondents openly acknowledged that their purpose in seeking to erect the display at this location was to erect "a symbol for our Lord, Jesus Christ" (J.A. 173) in furtherance of their more general purpose to "establish a Christian government in America." (J.A. 144-147).

2. The Capitol Square is owned by the State of Ohio and located in downtown Columbus. It is the site of Ohio's state capitol building, also known as the Ohio Statehouse, which is a large rectangular building that centers the Capitol Square. The Ohio Statehouse, which is a distinctive example of Greek Doric architecture, is topped by a large rotunda. For well over a century, it has housed both chambers of the Ohio General Assembly as well as the offices of the Ohio Governor and other statewide officeholders. (J.A. 96-97). The Ohio Statehouse is the dominant feature of the Capitol Square, and it is plainly and unavoidably visible from every vantage point on the Capitol Square. *See* App. A43 (photograph). The District Court held in this case that the Capitol Square is a public forum. *See* App. A18.

For the past several years, the State of Ohio has allowed certain holiday seasonal displays to be placed on the Capitol Square for limited periods during the month of December. (J.A. 98). The State's traditional policy is to

allow a broad range of speakers and other gatherings of people to conduct events on the Capitol Square. (J.A. 98). These displays are generally an exception to that policy because they are unattended structures. The holiday seasonal displays permitted by the State in the past have included a Christmas tree and a menorah. (J.A. 98).

On November 18, 1993, the Capitol Square Review and Advisory Board, which is authorized by law to regulate the uses of the Capitol Square, voted not to permit unattended displays on the Capitol Square during December of 1993. (J.A. 98). That vote was later declared invalid, and on November 23, 1993, the Board voted to approve displays of a Christmas tree and menorah. (J.A. 98-99). The State displayed its own Christmas tree, and a permit application to erect a menorah on the Capitol Square from December 8-16, 1993, which was explicitly stated to be a "seasonal display," was granted. (J.A. 99).

3. On November 29, 1993, Respondents applied for a permit to display a cross on the Capitol Square from December 8-24, 1993. (J.A. 99). The application described the type of event as being to "erect a cross for Christmas." (J.A. 99). Executive Director Keller denied the application on December 3, 1993, "upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts." (J.A. 99). Respondents later clarified that they sought to erect a cross in the style of a Latin cross,[1] about ten feet high and six feet

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[1] "Latin cross" is the proper term for any "cross whose base stem is longer than the other three arms." *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271, *cert. denied*, 479 U.S. 961 (1986) (affirming preliminary injunction against display of lighted Latin cross on top of city fire department

across and accompanied by a suggested disclaimer open to negotiation. (J.A. 100).

On December 9, 1993, Respondents filed an administrative appeal of this action to the full Board; the appeal was perfected on December 13, 1993. (J.A. 100-101). On December 17, 1993, a state administrative appeal was conducted by a hearing examiner who took evidence and heard argument from both sides. On December 21, 1993, the administrative hearing examiner issued a report and recommendation which found that the initial denial of a permit to Respondents was proper. App. A27. The hearing examiner held, among other things, that whereas holiday seasonal symbols have by virtue of that association taken on "cultural significance extending well beyond the religious sphere," the Latin cross "is generally regarded as having a purely sectarian purpose (*i.e.*, to advance or endorse the Christian religion)." App. A34-A35. For that reason, the display of a Latin cross directly in front of the Ohio Statehouse, unlike the display of a Christmas tree or a menorah, was held to violate the Establishment Clause. App. A36. The Board unanimously adopted this report and recommendation as its own final ruling later that day. App. A16.

4. In the meantime, on December 15, 1993, Respondents filed this lawsuit in District court, asserting that the denial of their application for permit to erect a cross violated their constitutional right of free speech. (J.A. 27). The court set the matter for hearing on December 20, 1993, and consolidated the hearing on Respondents' motion for a preliminary injunction with a trial on the merits. At the

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building during Christmas season because it would violate the Establishment Clause).

close of this hearing, the court deferred its ruling pending the outcome of the state administrative appeal process. Once that process was completed on December 21, 1993, the court granted a permanent injunction requiring Petitioners to approve a permit for Respondents to display a cross on the Capitol Square through December 24, 1993. App. A26.

In its ruling, the District Court considered whether Respondents' display of a large, unattended Latin cross directly in front of the Ohio Statehouse would constitute an impermissible "endorsement" of religion under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), as subsequently interpreted and applied in such "holiday seasonal display" cases as *Lynch v. Donnelly*, 465 U.S. 668 (1984), and *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). On the basis of a recent *en banc* decision by the Sixth Circuit Court of Appeals that addressed essentially the same issue, *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc), the District Court held that the unattended religious display in this case would not constitute an impermissible endorsement of religion so as to violate the Establishment Clause. App. A7-A8.

5. Immediately after the District Court issued its ruling, Petitioners moved for a stay pending appeal, which the court denied. Petitioners filed a Notice of Appeal to the Sixth Circuit on the same day -- December 21, 1993 -- and filed a motion for an emergency stay of the injunction pending appeal, which the Sixth Circuit denied on December 22, 1993. App. A40. Petitioners then filed an emergency application for a stay of injunction with Circuit Justice Stevens, which was denied on December 23, 1993. App. A38.

6. Respondents erected a cross on the Capitol Square sometime during the night of December 21, 1993, and it was displayed there the following day until it was apparently vandalized. The cross was displayed by itself in the middle of the lawn directly in front of the Ohio Statehouse, *see* App. A43 (photograph), located at some distance from the Christmas tree.[2] On December 22, 1993, Petitioners received yet another application from a group of Christian ministers, who sought to erect twenty more Latin crosses in front of the Ohio Statehouse. Petitioners believed themselves obligated, by the force of the District Court's ruling, to grant this further application, and thereafter numerous other crosses were erected and displayed in the same vicinity on December 23-24, 1993. (J.A. 60) (Appendix to Brief In Opposition To Writ Of Certiorari p. RA 31 ("Opp. App.")).

7. On appeal, the Sixth Circuit affirmed the District Court's ruling. App. A1. The Sixth Circuit adhered to its recent *en banc* decision in *Americans United*, which "held that a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." App. A8. The court focused in particular on the nature of the display and the nature of the forum. It essentially held that because this display was privately sponsored, it did not matter what was contained in the display -- for example, a Latin cross in this case as opposed to a menorah in cases like *Americans United* and *County of Allegheny*. Because this display was to be located in a public forum, moreover, it did not matter what kind of location was to exhibit the display -- for example, the Ohio Statehouse in this case as opposed to a public park in cases

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[2] The menorah had been removed almost a week earlier, when that permit expired on December 16, 1993.

like *Americans United* and *Lynch*. The Sixth Circuit thus determined that a reasonable observer could not conclude that the State of Ohio endorsed Christianity after viewing a large, unattended Latin cross standing directly in front of the Ohio Statehouse because "'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" App. A9 (quoting *Americans United*, 980 F.2d at 1553) (emphasis in original). On this ground, the Sixth Circuit held that Respondents' display of a Latin cross directly in front of the Ohio Statehouse did not constitute an impermissible endorsement of religion under the Establishment Clause.

SUMMARY OF ARGUMENT

Displays of purely religious symbols at the seat of government, such as the large solitary and unattended Latin cross placed directly in front of the Ohio Statehouse in this case, violate the Establishment Clause of the First Amendment.

A purely religious symbol, such as a Latin cross, the ultimate sectarian symbol of Christianity, conveys a clear message of religion. *See American Civil Liberties Union v. City of St. Charles*, 794 F. 2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). At the same time, the symbol of the seat of government, in this case the Ohio Statehouse, conveys a clear message of government authority. *Kaplan v. City of Burlington*, 891 F. 2d 1024 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). The conjunction of the two communicates powerfully to an observer that the message conveyed by each symbol comes from the same source -- the government. *Id.*

In most circumstances, an observer can easily identify those responsible for speech: the speaker at the microphone,

the group chanting a slogan, the person holding a sign or passing out brochures. But when speech is conveyed by an unattended display, the author of the speech is not readily ascertainable and usually is perceived by most reasonable observers to be the owner of the property on which the display stands.

The Establishment Clause protects against religious messages bearing the government's imprimatur. *Widmar v. Vincent*, 454 U.S. 263 (1981). The juncture of the cross and the government building in an unattended setting creates the danger against which the Establishment Clause guards.

The Court has not addressed whether a union of church and state is legally permissible if it occurs in a public forum. The Sixth Circuit adopted a *per se* rule that, because a display is privately sponsored in a public forum, there can never be a misperception of the message. But nothing in the Court's precedents removes, for Establishment Clause purposes, the obligation of a court to determine the nature of the message being sent and received. The fact that the message is delivered in a public forum does not give the government the right to advocate religion. Nor may it permit a private party to proffer speech which is likely to be perceived as government speech endorsing religion. Public forum or no public forum, government may not throw its weight behind sectarian evangelism, nor may it permit a private party to create the impression that government supports religion. But just such an impression is created when an unattended, purely religious symbol, such as the Latin cross, is positioned with the state capitol as its backdrop.

The court below incorrectly held that one part of the First Amendment -- the free speech clause -- always trumps another part of the First Amendment -- the Establishment

Clause -- when speech is uttered in a public forum. Under such rationale, no inquiry ever need be made whether, under the circumstances of the case, the speaker in the public forum appears to be the government and the speech appears to be endorsement of religion. If the Framers had intended such power of the Free Speech Clause, one would think that they would at least have placed it before the Establishment Clause.

The Court's cases dealing with holiday seasonal displays offer two tests for evaluating the issues in the instant case. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989). Each test attempts to strike a proper balance so that government neither advances nor inhibits religion. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). This includes not preferring the religious practices of one group at the expense of other groups, or even religious non-adherents. *County of Allegheny*.

The union of an isolated and unattended religious icon and the seat of government upsets this constitutional balance. *Kaplan; Smith v. County of Albemarle, Va.*, 895 F. 2d 953 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 74 (1990). There is a significant risk that observers of the message conveyed by this union will perceive it as emanating from the government. For that reason, the unattended display in this case violates either test previously established by the Court.

Neither the Court's opinions nor reasoning in its "equal access" line of cases alters this conclusion. The equal access cases dealt with whether the message conveyed by government when allowing or denying access to government property communicates government preference for or intolerance to religion. *Widmar*; *Board of Education of Westside Community Schools v. Mergens*, 492 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free*

School Dist., ___ U.S. ___, 113 S. Ct. 2141 (1993). The Court concluded in the context of those cases that equal access was necessary to convey government neutrality toward religion. Although in those cases the Court found no significant risk of misperception of the message conveyed by government, the inquiry was directed toward the perception of the listener or observer under each set of circumstances. *See generally id.*

In stark contrast, the Sixth Circuit's analysis in this case ceased once the court established that speech was uttered in a public forum by a private non-governmental party. The court below incorrectly limited its analysis to a factual determination of who spoke, rather than, in the circumstances presented, who a "reasonable observer" might rationally conclude spoke.

Government may make distinctions in speech if compelling interests exist for doing so. *Lamb's Chapel.* Here government has a compelling interest to avoid violating the Establishment Clause. A complete prohibition on purely religious symbols at the seat of government is the only, and, therefore, the most narrowly tailored way to accomplish that goal. Disclaimers are entirely ineffectual and themselves create the risk of government entanglement with religion.

ARGUMENT

I. A PURELY RELIGIOUS SYMBOL, SUCH AS A LARGE UNATTENDED LATIN CROSS, CLOSELY ASSOCIATED WITH THE SEAT OF GOVERNMENT, CONVEYS AN UNMISTAKABLE MESSAGE OF GOVERNMENT IMPRIMATUR OF RELIGION.

In the Court's line of seasonal holiday display cases, the Court has confronted the fact-specific nature of each case. That inquiry has been criticized as dealing with "jurisprudence of minutae". *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 674 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The Court need not engage in the same analysis in this case. Any isolated, unattended display of a purely religious symbol at the seat of government violates the Establishment Clause. The combination of symbols representing church and state conveys too powerful a message that can easily be misunderstood, especially in a context where an observer has no readily identifiable source to which to attribute the message, other than government itself.

Symbols elicit direct and immediate emotions due to their strong and enduring meaning. A religious, especially sectarian, symbol, no matter what the particular physical setting may be, conveys the unmistakable message of that symbol's religious doctrine. The Latin Cross is a powerful example of just such a symbol: ". . . the cross is a symbol par excellence of Christianity itself as well as of Christ its head. ... [T]he cross is endowed with transcendent significance." Anderson Affidavit ¶¶ 8 and 11 (J.A. 131-

132). No ambiguity about the symbolic meaning of the Latin cross exists.

Similarly, a seat of government such as the Ohio Statehouse stands inexorably as a symbolic "metaphor for government." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 (7th Cir. 1987). When the universal symbol of Christianity is placed directly in front of the Ohio Statehouse, it is inseverably linked to the symbolic center of government. In *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 632 (1943), the Court recognized the inescapable association between various symbols:

> Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes, *the church speaks through the Cross*, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas *just as religious symbols come to convey theological ones*. (emphasis added).

The meaning of a symbol must be viewed in the overall context of its setting. "The context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence v. Washington*, 418 U.S. 405, 410 (1974). Scholars have observed that "people's responses to a symbol will be

contingent upon their assessments of the circumstances of its usage." C. Elder & R. Cobb, The Political Uses of Symbols 57 (1983). This is especially true if the symbol is visually linked to other symbols. "When a particular symbol is used in conjunction with several other symbols, they may all become linked in the eyes of the general public." *Id.* at 77.

Respondents in the instant case were permitted, based upon the lower courts' decisions, to erect a Latin cross at the seat of secular government. Just as the Latin cross conveys a powerful message of religion, the Ohio Statehouse conveys a powerful message of governmental authority. *See American Jewish Congress*, 827 F.2d at 128 (discussing the symbol of city hall); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029-30 (2nd Cir. 1989), *cert. denied*, 496 U.S. 926 (1990) ("the park involved is not any city park, but rather City Hall park. This Park is bounded on the east by City Hall, the seat and the official symbol of Burlington city government. . . ."). And, just as the Latin cross is the most recognizable symbol of Christianity, the Ohio Statehouse is the single most visible and recognizable symbol of government in the State of Ohio. Any association of the two threatens to blur the distinction between church and state because the observer will view it as government's sponsorship of religion.[3]

The Establishment Clause protects against "any imprimatur of state approval of religious sects or practices."

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[3] The Latin cross was not erected as part of a holiday seasonal display but stood majestically by itself in the middle of the front lawn of the Capitol Square. App. A43. Respondents' application specifically requested this location which was apart from and a distance away from where the Christmas tree and menorah were located. (J.A. 43).

Widmar v. Vincent, 454 U.S. 263, 274 (1981). The combination of the cross and government, in a context where the latter is perceived to support the former, creates this danger.

It has long been recognized that speech may take many forms, including such nonverbal forms as symbolic displays. Not all forms of speech, however, have equivalent impact. Sometimes, such as in this case, speech must be evaluated not only on the basis of its content, but also as to the identity of the speaker. A determination of authorship often is directly determinable from the columnist, the television commentator, the rally speaker, the sign holder. All can be noted directly by the reader or the listener. But in the case of an unattended display, the source of the communication must be inferred. In the absence of clear and direct information to the contrary, an observer reasonably perceives the message conveyed by an unattended display as the message of the landowner.

The grounds of the Ohio Statehouse, in addition to being a public forum, as observed by the Sixth Circuit, are home to statues of historical figures important to Ohio and Columbus. As the record reflects, these grounds have previously housed only two other temporary, unattended displays -- a secular and pluralistic seasonal display and a chart showing the progress of the community's United Way campaign. Observers of these unattended displays correctly will perceive the message conveyed by these symbols as messages supported and approved by the State of Ohio.

The Sixth Circuit declared that since the unattended display of the Latin cross was presented in a public forum, only a "hypothetical dolt" would not realize this message came from private citizens, not the government. Because government can and does convey symbolic unattended

messages from the very grounds upon which private speech rallies frequently occur, however, the mere fact that private speech is permitted does not remove the inference that an unattended display on government property is government endorsed.

A battery of cases has held that the display of a cross on government property "dramatically conveys a message of governmental support for Christianity, whatever the intentions of those responsible for the display may be." *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 271 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986). *See Gonzales v. North Township of Lake County*, 4 F.3d 1412, 1423 (7th Cir. 1993) (court held that the cross "does not bear secular trappings sufficient to neutralize its religious message," and indeed "does not convey any secular message, whether remote, indirect, or incidental").

For this reason, courts regularly and persistently have granted injunctions and other proper relief when an Establishment Clause challenge is raised against an attempt by anyone to display a Latin cross on government property. *See, e.g., Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989) ("no federal case has ever found the display of a Latin cross on public land by a state or state subdivision to be constitutional"); *American Civil Liberties Union v. Mississippi General Services Admin.*, 652 F. Supp. 380, 384-85 & n.2 (S.D. Miss. 1987) ("in no other federal case either before or since *Lynch v. Donnelly* has the public display of a cross by a state or subdivision thereof been found to be constitutional").

This judicial result has been the same whether the Latin cross on government property is large, *see, e.g., Jewish War Veterans v. United States*, 695 F. Supp. 3, 5 (D.D.C. 1988) (65' illuminated cross serving as war

memorial on Marine Corps base; permanent injunction granted); *Mendelson*, 719 F. Supp. at 1066 (12' cross on city water tower; injunction granted), medium-sized, *see, e.g., Libin v. Town of Greenwich*, 625 F. Supp. 393, 394 (D. Conn. 1985) (3' x 5' illuminated cross on firehouse; preliminary injunction granted), or quite small, *see, e.g., Harris* v. *City of Zion*, 927 F.2d 1401, 1402-04 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 3054 (1992) (Latin cross appeared in one quadrant of municipal corporate seals; permanent injunction granted); *Friedman v. Board of County Commissioners*, 781 F.2d 777, 779 (10th Cir. 1985) (en banc), *cert. denied*, 476 U.S. 1169 (1986) (Latin cross appeared on county seal; injunction granted).

In addition, this has been true even when the display of the Latin cross on government property has existed for many years, *see, e.g., American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1101 (11th Cir. 1983) (cross in state park originally dated back almost 30 years; permanent injunction granted); *Jewish War Veterans*, 695 F. Supp. at 5 (cross on Marine Corps base more than 22 years; permanent injunction granted), and even where it was privately sponsored. *See Gonzales*, 4 F.3d at 1422-23 (crucifix in public park for more than 40 years; permanent injunction granted). It is this judicial recognition of the inability of an observer to separate the state from the message of the Latin cross that undermines the decision below.

II. THE ESTABLISHMENT CLAUSE MAY REQUIRE A FINDING OF THE UNCONSTITUTIONALITY OF AN UNATTENDED RELIGIOUS DISPLAY, EVEN IF SUCH DISPLAY STANDS IN A PUBLIC FORUM

The decision of the court below is sweeping in scope, creating a *per se* rule obviating the need to examine how the message is perceived by a reasonable observer. The lower court focused not on the risk that the government's message will be misperceived, but only on the public nature of the forum in which the message is relayed.

The nature of a public forum guarantees broad communication. The Court first recognized the concept of the public forum in *Hague v. CIO,* 307 U.S. 496 (1939). The Court observed that streets and parks in this country universally have been considered public forums:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Id. at 515. *See also Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct 2131, 2146 (1993) ("parks and sidewalks are traditional public fora"); *International Soc'y for Krishna Consciousness v. Lee*, ___ U.S. ___, 112 S. Ct. 2711, 2717 (1992) (Kennedy, J.,

concurring) ("types of property that we have recognized as the quintessential public forums are streets, parks, and sidewalks").

In these traditional public forums, as well as in so-called "designated" or "limited" public forums, the government may not prohibit all communication. *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, 473 U.S. 788 (1985); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 470 U.S. 37, 45 (1983) ("[I]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed.") (emphasis added).

The public forum doctrine by itself, however, does not require the State of Ohio to permit the erection of *any* symbol upon government property characterized as a public forum.. Just as "[t]he principle that government accommodation of the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause", *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649, 2655 (1992), the public forum doctrine should not be permitted to "swallow up" the Establishment Clause. *Kaplan*, 891 F.2d at 1029. That a message is delivered in a public forum does not give government the right to advocate religion. Nor may it permit a private party to proffer speech that is likely to be perceived as government speech endorsing religion. Public forum or not, government may not lend its support to a particular religious message or allow private parties to manipulate government for that purpose.

In *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846 (1992), Justice Kennedy squarely recognized the inherent clash between competing constitutional doctrines:

> The same use of the compelling interest test is adopted today, not to justify or condemn a category of suppression but to determine the accuracy of the justification the State gives for its law. There is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for an accommodation of another constitutional right.

Id., 112 S.Ct. at 1859 (Kennedy, J., concurring). And just as competing doctrines were balanced in that case, they must be balanced here. The Sixth Circuit's holding does not balance competing doctrines. It allows one to trump the other.

A. The Broad Ruling Of The Sixth Circuit Court Of Appeals Is Inconsistent With The Court's Precedent.

Relying in large part on its decision in *Americans United for Separation of Church and State v. Grand Rapids*, 980 F. 2d 1538 (6th Cir. 1993) (en banc), the court below held that a privately sponsored unattended religious display erected on Capitol Square, a public forum that is a part of the Ohio Statehouse grounds, can *never* constitute an impermissible establishment of religion. But even the Sixth Circuit recognized in *Americans United* that a fact-specific approach must be utilized:

> ... when applying the endorsement test to this case, we must examine all the relevant facts, consider carefully the amount of weight to give each fact, and be careful to treat religious

> displays fairly. We must avoid hasty reliance on partial similarities between the facts at hand and those found in other cases. Even if this display appears similar in some respects to others that have been found unconstitutional in the past, other factors, unique to this case, may require us to uphold [the challenged government action here].

American United, 980 F.2d at 1544. *See Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring) ("[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion").

In reaching its decision, however, the lower court below failed to engage in an evaluation of "all the relevant facts." *Id.* Rather, the court relied on only two facts from its decision in *Americans United* and considered those two facts to be conclusive: (1) Respondents' display would be privately sponsored and (2) it would be located in a public forum.

That approach is inconsistent with the Court's precedents. In *County of Allegheny*, the Court upheld the display of a privately sponsored menorah that was placed next to a Christmas tree on government property. The Court did not hold such display proper simply because it was a private display, even though the government had created an open forum for it. Rather, the Court engaged in a fact-specific analysis to determine that the display of the menorah did not create the danger of misperception against which the Establishment Clause guards.

Similarly, the Court in its "equal access" line of cases has not focused exclusively on the public nature of the

forum. Thus, in *Widmar*, the Court found that no Establishment Clause violation existed because the university students there would not perceive the government as sponsor of religion. The Court, however, still engaged in an analysis of the nature of the message conveyed and received, rather than simply the forum in which it was expressed. "[T]he nature of the location as a public forum is but one factor to consider in determining whether the context of the display suggests government endorsement of religion." *Kaplan*, 891 F. 2d at 1029.

Moreover, the Sixth Circuit's test is unworkable for it has no limit. It would make no difference under the lower court's test whether the symbol at issue was a plain unadorned cross or a crucifix. Nor, under the Sixth Circuit's test, would the speaker's identity make any difference: government officials, as private citizens, could sponsor religious displays in front of a government building for purposes in conflict with the Establishment Clause.

To be sure, the record reflects the presence of a disclaimer of government involvement posted at the base of the cross. Under the Sixth Circuit's test, however, the disclaimer was irrelevant - all that mattered was the assumed widespread recognition of Capitol Square as a public forum. The Sixth Circuit would have upheld the constitutionality of the display of the Latin cross regardless of the presence of a disclaimer.

B. The Second And Fourth Circuits, Not The Court Below, Have Struck The Appropriate Balance Between The Competing Doctrines Of Free Speech And The Establishment Clause.

As the Sixth Circuit explicitly acknowledged, its position is in direct conflict with that of the Fourth and Second Circuits: "We decline the invitation to follow several cases cited by the plaintiffs." *Americans United*, 980 F. 2d at 1550-51 (discussing *Smith v. County of Albemarle, Va.*, 895 F. 2d 953 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S. Ct. 74 (1989), and *Kaplan*, 891 F. 2d 1024).

The Second and Fourth Circuits' rulings in *Kaplan* and *Albermarle County* strike the appropriate balance between the competing doctrines of Free Speech and the Establishment Clause. Specifically, in *Albermarle County*, the Fourth Circuit struck down as an impermissible establishment of religion the display of a creche by the local jaycees. There, the creche was displayed in a traditional public forum, the front lawn of a county office building. Analyzing facts virtually identical to the present case, the court emphasized the specific location the creche was to occupy by stating:

> Finally, and most significantly, the creche was displayed *in the context of a government site*. That is, one could not readily view the creche without also viewing the trappings and identifying marks of the state. This visual association was, in the district court's view, unmistakable and impossible to sever.

Id. at 955-56. (emphasis added).[4]

Thus, the court explicitly recognized the inescapable associational link between an unattended religious display and a government building. The reasonable observer would naturally perceive that such a display, located directly in front of a building which houses the very offices of its government leaders, appears to stand with the "stamp of government approval". *American Jewish Congress*, 827 F.2d at 128.

Similarly, the Second Circuit in *Kaplan* found that a private group's unattended, solitary display of a large

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[4] The Fourth Circuit affirmed the decision of the district court, which emphasized the importance of the location and nature of the display:

> In part, the message of endorsement arises because of the symbolic embrace created by the location of this creche ...
>
> It is important to note that this creche . . . is privately owned and privately maintained. Certainly, that serves to undercut somewhat the connection between the government and the display. However, that distancing or disengagement between religious display and government presence which is entailed because the creche is privately-owned is minimal in comparison with the strong visual association between church and state produced by the symbolic embrace.

Smith v. Lindstrom, 699 F. Supp. 549, 561-62 (W.D.Va. 1988), *aff'd*, 895 F. 2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990).

menorah in the public forum of City Hall Park, located directly in front of the seat of the Burlington city government, violated the Establishment Clause. The court in *Kaplan* rejected the argument adopted by the court below -- "that the [appellees] have an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park" -- because otherwise "the public forum doctrine would swallow up the Establishment Clause." *Id.*, 891 F. 2d at 1029. In so holding, the *Kaplan* Court went to great lengths to distinguish a symbol for the Christian faith, standing alone and unattended, from a live speaker. Specifically, the Second Circuit stated:

> Thus, while previous, apparently noncontroversial, uses of the Park suggesting religious activity could be clearly tied to a speaker, the display of this unattended, solitary, semi-permanent symbol could not; and in the absence of a live speaker to whom responsibility could be attributed, the City was perceived as fulfilling the role of sponsor.

Id. at 1030.

In a more recent decision, the Second Circuit reaffirmed its adherence to the reasoning of *Kaplan*, again in a case involving a private organization's attempt to display an unattended menorah directly in front of the Burlington City Hall. *See Chabad-Lubavitch of Vt. v. City of Burlington*, 936 F. 2d 198 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3026 (1992) (court rejected private organization's proposal to move the menorah further away from City Hall and place it near two signs that sent a secular holiday message).

Application of the Second and Fourth Circuit's reasoning and rationale in *Kaplan*, *Albermarle County*, and *Chabad-Lubavitch of Vt.* is entirely appropriate in light of the "unique circumstances and context" of this case. *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring). Here, the large, unattended Latin cross located directly in front of the Ohio Statehouse, on government property, conveyed an unmistakable message of government support. Moreover, the record in the instant case indicates that Respondents' intent was to erect the Latin cross as a monument to "Our Lord, Jesus Christ" (J.A. 173), and to "establish a Christian government in America." (J.A.144-147). Respondents certainly recognized the powerful message communicated by a Latin cross located on Capitol Square because they went to great lengths to "place[d] the government's weight behind an obvious effort to proselytize on behalf of Christianity." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring and dissenting) (finding the placement of a large Latin cross on government property runs afoul of the Establishment Clause).

III. THE DISPLAY OF A SOLITARY UNATTENDED RELIGIOUS SYMBOL UNASSOCIATED WITH THE HOLIDAY SEASON AT THE SEAT OF GOVERNMENT VIOLATES THE ESTABLISHMENT CLAUSE UNDER ANY TEST PROPOSED BY THE COURT.

The Religion Clauses of the First Amendment are simply written, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," yet difficult to apply. *See Lynch*, 465 U.S. at 678 ("The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application.").

When analyzing the appropriateness of religious displays sponsored or permitted by the government, the Court has applied the "endorsement" test. *County of Allegheny*, 492 U.S. at 592-94. Alternatively, some members of the Court have advocated application of a "proselytism" test. *See id.* at 659-63 (Kennedy, J., concurring in the judgment in part and dissenting in part). Underpining both tests is the requirement of governmental neutrality toward religion. An unattended Latin cross, unassociated with a specific holiday season and displayed by itself at the very seat of state government, violates the Establishment Clause under any of the tests articulated by the Justices of the Court.

A. Neutrality

It is "settled law" that government must remain neutral toward religion. *Weisman*, 112 S.Ct. at 2667-68 (Souter, J., concurring) ("[W]e have consistently held the [Establishment] Clause applicable no less to governmental acts favoring religion generally than to acts favoring one religion over others."); *See also Board of Education of Kiryas Joel Village School District v. Grumet*, ___ U.S.___, 114 S.Ct. 2481, 2487 (1994) (Souter, J) (Establishment Clause requires that the state "favor[ ] neither one religion over others nor religious adherents collectively over nonadherents"); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973) (Establishment Clause commands that a state "pursue a course of 'neutrality' toward religion."). Commentators examining the history of the Establishment Clause also conclude that the clause was meant to promote governmental neutrality. "The principle that best makes sense of the establishment clause is the principle of the most nearly perfect neutrality toward religion and among religions." Douglas Laycock, *Nonpreferential Aid to Religion: A False*

Claim About Original Intent, 27 William and Mary L. Rev. 875, 922 (1986) (hereinafter "D. Laycock").

This requirement of governmental neutrality is inherent in the second prong of the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which requires that the "principal or primary effect" of challenged government action "must be one that neither advances nor inhibits religion." *Id.* at 612. At a minimum, the principle of neutrality requires that the government not be perceived as "conferring an 'imprimatur of state approval' on religion". *Id.*, at 657 (Kennedy, J., concurring in judgment in part and dissenting in part) (quoting *Widmar,* 454 U.S. at 274). Yet that is the danger here.

A person viewing a display at a place of government associates the display with the government. Respondents' own witness, Joseph Cooper, identified a United Way fund raising display on Statehouse grounds as government support for that cause. (J.A. 161). Similarly, although a Christmas tree conveys a secular message of the holiday season, everyone will perceive it as sponsored by government when erected on government property. The combination of the cross and Capitol Square offends the concept of neutrality, therefore, because the cross either will be misperceived as belonging to the government or supported by it.

B. Endorsement Test

The last time the Court reviewed the constitutionality of religious displays located on public property, it applied the endorsement test previously formulated by Justice O'Connor:

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principle remains the same. The Establishment

> Clause, at the very least, prohibits government from *appearing* to take a position on questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community."

County of Allegheny, 492 U.S. at 593-94 (quoting *Lynch*, 465 U.S. at 687 (O'Connor, J., concurring)) (emphasis added). In *Lynch*, the Court held that a city did not violate the Establishment Clause by including a creche in its annual Christmas display. Although leaving open the question regarding the constitutionality of a public display of "distinctively religious symbols such as a cross," *Lynch*, 465 U.S. at 695 (dissenting opinion), five Justices in *Lynch* "agreed upon the relevant constitutional principles: the government's use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government's use of religious symbolism depends upon its context." *County of Allegheny*, 492 U.S. at 597 (Blackmun, J.).

In the context of this case, the cross communicates nothing other than a purely religious message. It certainly cannot properly be understood to belong as part of a holiday seasonal display. In fact, the Latin cross "is not considered a Christmas symbol as such. It is a symbol of Jesus as the Christ." Anderson Affidavit ¶13 (J.A. 132); *St. Charles*, 794 F.2d at 272 ("the cross is not a traditional Christmas symbol"); *Libin*, 625 F. Supp. at 399 ("the cross has no meaning in the context of the celebration of Christmas except as a religious symbol"). Moreover, the cross, as a religious symbol of Christianity, is of far more universal and recognizable significance than the Nativity scene, for the Latin cross signifies to all who are familiar with the New Testament the crucifixion, resurrection, and salvation of Jesus Christ. *See* Anderson Affidavit ¶¶ 8-11 (J.A. 131-

132); *see also, e.g., Rabun County Chamber of Commerce*, 698 F.2d at 1110 ("the Latin cross is universally regarded as a symbol of Christianity"); *Libin*, 625 F. Supp. at 398 ("There is simply no historical connection of a cross to Christmas except as a symbol of those religions which accept Jesus Christ as a central figure.").

The Court has applied the endorsement test formulated in *Lynch* to strike down government action where only a government message has been sent. Thus, in *School District of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985), the Court invalidated programs in which religious school classes on secular subjects were financed by the public school system and taught by public school teachers. The Court cited Justice O'Connor's concurrence in *Lynch* to present the endorsement test:

> Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any -- or all -- religious denominations as when it attempts to inculcate specific religious doctrines. If this identification conveys a message of government endorsement or disapproval of religion, a core purpose of the Establishment Clause is violated. ....
>
> It follows that an important concern of the effects test is whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.

Id. at 389-90. *See also Texas Monthly v. Bullock*, 489 U.S. 1, 17 (1989) (plurality opinion) (tax exemption limited to religious periodicals "effectively endorses religious belief").

Of course, the Court also has upheld a creche in *Lynch* and a menorah and Christmas tree in *County of Allegheny*. But in each of these situations, the religious nature of the message was muted. For example, in *County of Allegheny*, Justice Blackmun considered the particular physical setting of the menorah:

> [T]he relevant question for Establishment Clause purposes is whether the combined display of the tree, the sign, and the menorah has the effect of endorsing both Christian and Jewish faiths, or rather simply recognizes that both Christmas and Chanukah are part of the same winter-holiday season, which has attained a secular status in our society.

Id., 492 U.S. at 616 (Blackmun, J.). Justice Blackmun went on to conclude that "the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season" because (1) the Christmas tree is not a religious symbol, (2) the menorah is the symbol for a holiday that has a secular dimension, and (3) the combination of the Christmas tree, menorah and sign proclaiming liberty confirms that displaying the menorah "is not an endorsement of religious faith but simply a recognition of cultural diversity." *Id.*, 492 U.S. at 616-20 (Blackmun, J.).

Justice O'Connor also considered the physical context of the display and formulated the relevant Establishment Clause question as:

> whether the city of Pittsburgh's display of the menorah, the religious symbol of a religious holiday, next to a Christmas tree and a sign saluting liberty sends a message of government endorsement of Judaism or whether it sends a message of pluralism and freedom to choose one's own beliefs.

Id., 492 U.S. at 632-37 (O'Connor, J., concurring in part and concurring in the judgment).[5] Considering the combined display in its particular physical setting, Justice O'Connor concluded that the display of the secular symbol of the Christmas tree with a salute to liberty and a religious symbol from a contemporaneous Jewish holiday "did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season." *Id.*, 492 U.S. at 635 (O'Connor, J., concurring in part and concurring in the judgment).

In contrast, the Latin cross is an inherently religious symbol, not ordinarily or directly tied to the Christmas holiday season, and has no secular component. The menorah, like the cross, is a religious symbol, but, unlike the cross, also has a secular component because it has become the representative symbol of the Chanukah holiday season. *County of Allegheny*, 492 U.S. at 613 (Blackmun, J.).

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[5] Justice Stevens, joined by Justices Marshall and Brennan, opined that "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property." *Id.*, 492 U.S. at 650 (Stevens, J., concurring in part and dissenting in part). He concluded that the display of the menorah "manifests governmental approval of the Jewish...religion[]." *Id.*, 492 U.S. at 654 (Stevens, J., concurring in part and dissenting in part).

Indeed, it was stipulated in this case that the menorah has both religious *and* secular significance when displayed for the Chanukah holiday season. (J.A. 98).

This point was critical to the Court's reasoning in *County of Allegheny* and was emphasized in each of the decisive opinions addressing holiday displays. *See id.*, 492 U.S. at 618 n.68 ("It does not demean Jewish faith or the religious significance of the menorah to say that the menorah in *this* context represents the holiday of Chanukah as a whole (with religious and secular aspects), just as the Christmas tree in this context can be said to represent the holiday of Christmas as a whole (with *its* religious and secular aspects).") (emphasis in original); *id.* at 626 (O'Connor, J., concurring in part and concurring in the judgment) (in *Lynch*, the "purpose of including the creche in the larger display was to celebrate the public holiday through its traditional symbols, not to promote the religious content of the creche"); *id.* at 665 (Kennedy, J., concurring in judgment in part and dissenting in part) ("The creche and the menorah are purely passive symbols of religious holidays [and] are the traditional symbols of religious holidays that over time have acquired a secular component").

Even when the Latin cross is displayed in conjunction with secular symbols of the holiday season, courts have held that its religious connotation cannot be neutralized by any non-religious associations. *St. Charles,* 794 F.2d at 273; *Mississippi State General Services Admin.*, 652 F. Supp. at 384. The display of the Latin cross, as an inherently religious and indeed a sectarian symbol, instead "'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'" *County of Allegheny*, 492 U.S.

at 595 (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)).

The endorsement test focuses on the perspective of a "reasonable observer" to determine whether a government action would be perceived as endorsing religion:

> While an adjudication of the display's effect must take into account the perspective of one who is neither Christian nor Jewish, as well as of those who adhere to either of these religions, the constitutionality of its effect must also be judged according to the standard of a "reasonable observer."

Id., 492 U.S. at 620 (Blackmun, J.) (citations omitted); *id.*, 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment) ("The question under endorsement analysis, in short, is whether a reasonable observer would view such longstanding practices as a disapproval of his or her particular religious choices. . . ."). Implicit in the reasonable observer model is that the perspective must not only be that of the reasonable member of the majority, but must at least be that of a composite of all members of society or of the "reasonable non-adherent." *Id*, 492 U.S. at 620 (Blackmun, J.) (citations omitted). Otherwise, focusing on the perspective only of the reasonable majority member of society would allow "society's insiders to characterize the message the outsiders receive." Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency*?, 98 Harv. L.Rev. 592, 611 (1985).[6]

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[6] Taking into account the perspective of the reasonable nonadherent also is appropriate because it was only with the advent of a more religiously pluralistic society that Establishment Clause theory became sharpened and tested. *See* Thomas J. Curry, The

As the majority of the Justices in *County of Allegheny* concluded, "nothing in the context of the display detracts from the creche's religious message" and permitting the display right at the seat of government "sends an unmistakable message that [the state] supports and promotes. . . the creche's religious message." *Id.*, 492 U.S. at 598-600. *See id.*, 492 U.S. at 626 (O'Connor, J., concurring in part and concurring in the judgment) ("[T]he creche displayed on the Grand Staircase of the Allegheny County Courthouse, the seat of county government, conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community.").[7]

The Latin cross conveys an even more powerful message of sectarian religion than a creche. The Seventh

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First Freedoms: Church and State in America to the Passage of the First Amendment 219 (1986).

[7] Again, although focusing on the unattended cross as the example in this case, any solitary unattended display of a religious symbol in front of the seat of government would suffer the same deficiency. Justices Blackmun and O'Connor indicated that, from the perspective of the "reasonable observer", a menorah standing alone would be improper. *See id.*, 492 U.S. at 616 n.64 (Blackmun, J.) ("The display of a menorah alone may well have [the] effect [of endorsing Judaism]"); *id.*, 492 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment) ("A menorah standing alone at city hall might well send such a message [of endorsement] to nonadherents [of Judaism]."). *See also* D. Laycock at 921 (implying that a cross on government property, even if paid for by private contributions, constitutes government endorsement of religion).

Circuit has said, "we are masters of the obvious, and know that the crucifix is a Christian symbol. We reached a similar conclusion about the Latin cross." *Gonzales*, 4 F.3d at 1418. Consequently, the Latin cross in a government setting fails the endorsement test.

C. Proselytism Test

Four Justices in *County of Allegheny* applied a different test than the endorsement test to uphold the display of the creche as well as the menorah. As formulated by Justice Kennedy, and joined in by Chief Justice Rehnquist, Justice White and Justice Scalia, the "proselytism" test assures that the government does not "coerce anyone to support or participate in any religion or its exercise; and it may not in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.'" *Id.*, 492 U.S. at 659 (Kennedy, J. concurring in the judgment in part and dissenting in part) (quoting *Lynch*, 465 U.S. at 678). *See Weisman*, 112 S.Ct. at 2655 (Court found that the Establishment Clause, at a minimum, requires the government to satisfy the proselytism test).

The proselytism test recognizes that government action violating the Establishment Clause is not limited to direct coercion, but also includes indirect coercion such as the symbolic recognition of religious faith. *Id.*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). As an example of the type of symbolic recognition that would violate the Establishment Clause, Justice Kennedy posited a city permitting the permanent erection of a large Latin cross on the roof of city hall. The Establishment Clause forbids such a display "because such an obtrusive year-round religious display would place the

government's weight behind an obvious effort to proselytize on behalf of a particular religion." *Id.*

The Latin cross displayed in Capitol Square conveyed the message of government proselytizing on behalf of Christianity. Because the "prestige, power, and influence of [the state]," *Arlington School District v. Schempp*, 374 U.S. 203, 207 (1963) (Goldberg, J., concurring), is no more manifest than at the seat of government, a Latin cross on the grounds of the state capital will inevitably implicate the state in the advancement of religion in violation of the Establishment Clause. *See Engel v. Vitale*, 370 U.S. 421, 431 (1962) ("When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.").

Significantly, two of the cases Justice Kennedy cites in his opinion in *County of Allegheny* supporting this proposition resemble the instant case. In *Rabun County Chamber of Commerce, Inc.*, the Eleventh Circuit had to determine whether the State of Georgia violated the Establishment Clause by permitting a private group to erect an illuminated Latin cross in a state park. Although initially approved by the state, the state stopped sanctioning the presence of the cross, *id.*, 698 F. 2d at 1102 n.4, and the private group remained responsible for constructing and maintaining the display. *Id.* at 1101. Nonetheless, the court held that the State violated the Establishment Clause by allowing a private group to erect a cross in a state park because the private group failed to establish a secular purpose for erecting the cross. *Id.* at 1111.

The other case cited by Justice Kennedy reached a similar result. In *Lowe v. City of Eugene*, 463 P.2d 360

(Ore. 1969), the court held that a city could not issue building permits for a private party to imbed a Latin cross in concrete on city-park property:

> The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol. Accordingly, persons who do not share those beliefs may feel that their own beliefs are stigmatized or officially deemed less worthy than those awarded the appearance of the city's endorsement.

Id. at 363. Admittedly, these cases involve permanent structures, whereas the display in the case at bar was meant only to be temporary. But the Constitution may be violated by a temporary as well as a permanent display.[8] Certainly the differerence between a permanent and temporary cross is lost on an Ohioan whose visit to Columbus is brief, but coincides with the temporary display. The person would be equally coerced by the cross on govenment property, whether permanent or temporary. Moreover, if a city cannot erect a Latin cross on the roof of city hall, as discussed by Justice Kennedy, it is difficult to discern the constitutional principle that would allow the same cross to be moved from the roof

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[8] Under the Sixth Circuit's reasoning other groups would presumably be permitted to erect Latin crosses in a continuous fashion, year round, thus creating a display that would be, in effect, permanent. Other church groups did in fact seek permission to erect twenty Latin crosses on the Capitol Square. Based upon the District Court's ruling, Petitioners granted these requests. *See* J.A. 60. (Opp. App. p. RA31) (photograph).

to the front of the building. This would lead to an obsession with constitutional minutia warned against by Justice Kennedy. *County of Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in judgment in part and dissenting in part). *See also Lynch*, 465 U.S. at 695 n.1 (dissenting opinion) (citing examples where public display of crosses on public property were struck down.)

Even if government action is noncoercive because it is "within the realm of flexible accommodation or passive acknowledgment of existing symbols," it may violate the Establishment Clause if "it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage." *County of Allegheny*, 492 U.S. at 662-63 (Kennedy, J., concurring in the judgment in part and dissenting in part). There is simply no historical basis for allowing a solitary, purely religious symbol to be displayed right at the seat of government. Indeed, even religious displays associated with a holiday season were not part of the cultural norm at the time the First Amendment was considered or ratified. *See Lynch*, 465 U.S. at 720-25 (dissenting opinion).

Undeniably, when the Establishment Clause was ratified, religion was an integral part of American society. The Establishment Clause, however, was intended to prevent the entanglement of government with religion, including the establishment of religion by some of the states. See generally Leonard W. Levy, The Establishment Clause (1994); *County of Allegheny*, 492 U.S. at 646 n. 1 (Stevens, J., concurring in part and dissenting in part).

Although "historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action," *Lynch*, 465 U.S. at 718 (dissenting opinion), the Court has upheld publicly supported religious

activities when "[t]he Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees." *Lynch*, 465 U.S. at 673. Thus, the Court upheld a state legislature's use of official chaplains to give prayers at the opening of legislative sessions in part because the Framers of the Establishment Clause enacted their own legislation providing for paid chaplains. *Marsh v. Chambers*, 403 U.S. 783 (1983). The Framers, however, did not contemplate the display of a Latin cross at the seat of government. Even in the pervasively Christian climate of Colonial America, the historical record is devoid of any references to a tradition of the public display of crosses or other religious symbols at government buildings. For example, there were no religious symbols on government buildings in Williamsburg, Virginia, during the Colonial era.[9] Marcus Whiffen, The Public Buildings of Williamsburg: Colonial Capitol of Virginia: An Architectural History (1958) (a leading scholarly review containing photographs, drawings, and diagrams depicting public buildings, including government buildings.) Indeed, the public display of religious symbols generally was "strongly discouraged." Dell Upton, Holy Things and Profane: Anglican Parish Churches in Colonial Virginia 119 (1986). This is consistent with the lack of public religious displays, even those commemorating holidays, during that time period. *See Lynch*, 465 U.S. at 720 (dissenting opinion). *See also County of Allegheny*, 492 U.S. at 669 (Kennedy, J., concurring in judgment in part and dissenting in part) ("[D]isplays commemorating religious holidays were not commonplace in 1791.").

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[9] This is significant because Virginia was the historical crucible of the First Amendment. Anson P. Stokes and Leo Pfeffer, Church and State in the United States 65 (1964).

There is no long-standing tradition of erecting unattended religious displays on government property. Thus, allowing such a display would appear to confer a benefit on religion by proselytizing. Undoubtedly, religion benefits from the display at the seat of government of a purely religious symbol unassociated with any holiday season; but the Establishment Clause prohibits such a benefit. *See County of Allegheny*, 492 U.S. at 601 n.51 ("[P]rohibiting the display of a creche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause precludes.").

IV. THE EQUAL ACCESS CASES OF *WIDMAR*, *MERGENS*, AND *LAMB'S CHAPEL* CAN BE DISTINGUISHED FROM THE PRESENT CASE AND THEREFORE ARE NOT CONTROLLING.

The court below relied heavily on the so-called "equal access" line of cases. *See Widmar*; *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); and *Lamb's Chapel*. However, these cases are distinguishable for four reasons.

First, as noted earlier, the Court in these cases did not focus entirely on the nature of the forum, as did the court below. Thus, in *Widmar*, the Court held that the University of Missouri at Kansas City was precluded from denying access to a religious group to use its facilities when the university had previously provided an equal access policy for its facilities for over one hundred other student groups of all types. The Court focused on the second prong of the

tripartite *Lemon* test, whether the university's action had the primary effect of advancing religion, and found that "[i]n this context, we are unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." *Id.* at 273 (emphasis added) (citing *Nyquist*, 413 U.S. at 771).

Similarly, in *Mergens*, the Court analyzed the constitutionality of the Equal Access Act, 20 U.S.C. §§ 4071-4074. In holding that the Act did not violate the Establishment Clause, the Court stated that "although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.* 496 U.S. at 253. In *Lamb's Chapel*, the latest in the equal access line of cases, the Court ruled that the school district's denial of a church group's request to use school facilities to show a religious film violated the group's free speech rights:

> The showing of this film would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members. The District property had repeatedly been used by a wide variety of private organizations. Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental.

Lamb's Chapel, 113 S. Ct. at 2148. Thus, while the public nature of the forum was a factor, it was not automatically determinative.

Second, the Court took special care under its analysis in *Mergens* to note that the Act expressly limited participation by school officials at the religious meetings and that any such meeting was not to be held during "noninstructional time". Further, in *Lamb's Chapel,* the Court emphasized that the religious films were to be shown on a voluntary basis and were to take place after regular school hours. The Court, in making these observations, focused on the fact that a reasonable observer would not see the religious meetings as government support or endorsement of religion. The reasonable observer would know that the schools had previously opened their facilities to various civic and recreational groups *after regular school hours* and that the religious gatherings were merely an attempt by the schools to allow the religious organizations equal access to school facilities.

In contrast, in this case, the Latin cross, the universal "symbol" of the Christian faith, stood in constant vigil conveying its religious, sectarian message. It did so linked in the observer's eye with the symbol of state government, in full public view on Capitol Square, located at the busiest intersection in the state capital. There was little present to dilute the pervasively strong message that the combination of these symbols of church and state conveyed to onlookers.

Third, in the equal access cases, the school facilities had been opened to numerous other social, civic, and recreational *groups*. However, very few *unattended* structures have been permitted on the Square. The record indicates that the only unattended display that had ever been permitted on Capital Square (other than the holiday seasonal

display) was a United Way fund raising "Thermometer." The Court should again note that Respondents' witness, Joseph Cooper, viewed the United Way "Thermometer" as a symbol of state support for the United Way. (J.A.161).

Finally, failing to allow equal access in the above cases would have demonstrated hostility to religion by removing the topic of religion itself from facilities that were otherwise open to all. In those cases it would have been perceived as hostility if religion were singled out as the only subject not granted access. In this case, there is virtually no history of unattended displays on Capitol Square. The public, therefore, would not perceive denial of the cross display as singling out religion for hostile treatment.

At least two circuit courts of appeals have distinguished the equal access line of cases from cases involving unattended religious displays. In *Kaplan*, the court noted that "here, unlike in *Widmar*, the City's equal-access policy is incompatible with the Establishment Clause" because "the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government", confers the imprimatur of state approval on religious practices. 891 F. 2d at 1030. *See also Chabad-Lubavitch of Vt.*, 936 F. 2d at 112 (Second Circuit held *Mergens* "is factually distinguishable ... for the same reason that its predecessor [*Widmar*] was distinguishable from *Kaplan*: it involved an open forum, with live speakers, in a public university.") Similarly, the Fourth Circuit held:

> In *Widmar*, the Supreme Court found that no imprimatur of state approval would be transmitted through an open access policy in that case. But here, because of the nature, size, location, and duration of the display, and

> its relation to the symbolic center of government, the appearance of a government imprimatur upon certain religious ideologies is present.

Albermarle County, 895 F. 2d at 959 n. 6 (quoting *Lindstrom*, 699 F. Supp. at 565). This Court should agree that the equal access cases are inapposite.[10]

V. GOVERNMENT HAS A COMPELLING INTEREST TO AVOID VIOLATING THE ESTABLISHMENT CLAUSE, AND THE MOST NARROWLY TAILORED MANNER TO ACHIEVE THAT GOAL IN THIS CASE IS AN OUTRIGHT BAN ON THE RELIGIOUS DISPLAY AT ISSUE.

The First Amendment right of free speech is a cherished doctrine. The freedom of individuals to address their thoughts to others is a hallmark of our democracy which sets the United States apart from many other countries in the world. But like all other rights, the First Amendment is not absolute. It does not mandate that all speech must be required at all times, in all forums, or under any and all

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[10] Furthermore, the Court has treated the equal access cases and seasonal display cases as analytically separate. The Court has held that the former applies to speakers who seek access for themselves to conduct meetings or similar events in facilities that have been opened for general use by the public, while simply treating its decisions concerning holiday seasonal displays as distinct without real discussion. *See, e.g., Mergens*, 496 U.S. at 249; *cf. County of Allegheny*, 492 U.S. at 600 n.50 (noting that the relationship between these two lines of doctrine has not yet been considered or resolved).

circumstances. Restrictions on speech may be validly imposed if a compelling governmental interest exists for such restrictions. *Lamb's Chapel*, 113 S. Ct. at 2148 ("[T]he interest of the state in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgement of free speech otherwise protected by the First Amendment....") (quoting *Widmar*, 454 U.S. at 271).

The court below found that in a public forum, the right of freedom of speech is such that no symbol conveying speech can be excluded because of its content. The court obviously was swayed by the power of the fundamental right of freedom of speech. Indeed, freedom of speech is so ingrained in American justice and culture that the framers of our Constitution listed it before all other rights preserved in the Bill of Rights -- save one: the prohibition of government involvement in religion. There is no more compelling reason than a violation of another, at least equally prominent, provision of the Constitution to justify a restriction on speech. *Widmar*, 454 U.S. at 271.

Of course, the limitation justified by a compelling governmental interest must also be narrowly tailored to avoid sweeping too broadly. But here, a complete ban on unattended solitary religious symbols is the narrowest manner in which to achieve the State's goal.

Respondents attempted to place a disclaimer on the cross. But such disclaimer was entirely ineffectual as it was small and buckled in the wind. Moreover, such disclaimer could not easily be seen from cars, by pedestrians passing by, and certainly could not be seen or understood from the many tall office buildings surrounding the Capital Square Plaza. Nor was the disclaimer necessarily understood by children, the non-English speaking, or the illiterate. Yet in comparison, from any distance or angle, none of the

individuals mentioned above could have had any difficulty understanding the message of the cross.

More importantly, requiring the private sponsor to place a disclaimer at the display, or requiring the government itself to place a disclaimer every time it authorizes a display of this type, will not remedy an Establishment Clause violation. A disclaimer does not effectively neutralize the appearance of government endorsement. The juxtaposition of the cross with the statehouse is a setting that conveys an overwhelming message of endorsement, one that no disclaimer can affectively mute. *See Stone v. Graham* 449 U.S. 39, 41 (1980) (even an explanatory plaque cannot prevent the invalidity of a posting of the Ten Commandments on school room walls); *Albemarle County*, 895 F.2d at 958 ("It remains to be seen whether any disclaimer can eliminate the patent aura of government endorsement of religion. In effect, such an aura defeats [the government's] attempt to argue for a remedial measure short of total removal of the creche.")

The most powerful symbol of Christianity, placed in conjunction with the most prominent symbol of government, the Statehouse, is simply too powerful a message of government endorsement to be effectively neutralized by a disclaimer. *See Albermarle County*, 895 F.2d at 960 ("Given a compelling state interest to remove any suggestion of governmental endorsement of religion, the district court found the most narrowly tailored means available to be outright exclusion. ... If a disclaiming sign is not sufficient to alter the message of endorsement, it is paradoxical to conclude that requiring such a disclaimer serves as a more narrowly tailored regulation.")

Even if a disclaimer could be effective under some circumstances, it raises its own Establishment Clause

problems. In order to ensure a disclaimer's effectiveness, the government will either have to negotiate with the private group over the language to include in the sign, or design its own sign. Assisting the private group in designing a disclaimer that explains both the sponsorship of the display and the government's lack of involvement with the display will only lead to the government entangling itself in the affairs of a religious group.

Requiring the government to place its own disclaimer is even more problematic. There is a fine line between non-approval and disapproval in the minds of many people. A sign that communicates the government's complete non-involvement could be interpreted as being hostile to religion. A sign declaring the Statehouse lawn to be a public forum and thereby disassociating the government from any displays is at best confusing, and at worst misleading.

The government also cannot separate itself from the display's religious message by means other than a sign. Holding press conferences and issuing press releases cannot entirely negate the display's message. Many of the people who visit the Statehouse are not residents of Columbus and would not be aware of the media attention. Furthermore, even residents of Columbus may have no more than a passing familiarity with the issue or may even misconstrue the media's attention. A likelihood exists that the more government attempts to disassociate itself from the display, the more someone will connect the two. *See Kaplan*, 891 F. 2d at 1030 (Court relied on testimony by the City Attorney that "last year we had to say that [the menorah was not sponsored by the City] so often that it became ours in some people's minds.").

Both courts below concluded that the prospect for confusion among the public concerning the sponsor of the

cross was minimized by publicity detailing the State's opposition. But First Amendment rights should not hinge on the interest the media takes in an issue. A press release saying that government had nothing to do with a cross put up by a church would be of no benefit if the media did not find the story newsworthy. It also is illogical for cases such as this to turn on the degree of the government's opposition. In essence, the rule fashioned by the courts below would inform the government that the more it opposed a particular display and the more publicity that opposition generated, the greater the likelihood that the state would be required to permit the display.

The State has a compelling interest to avoid the blending of the cross' message with the government's. Neither a disclaimer nor publicity can separate the two when linked by their most recognized symbols. Because the display at issue links the Latin cross with the State Capitol, this Court must find a violation of the Establishment Clause.

CONCLUSION

For the reasons set forth, this Court should reverse the decision of the court below.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Richard H. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the temporary, unattended display of a Ku Klux Klan cross on a public forum open to all other political and religious expression violates the Establishment Clause solely because the public forum is in proximity to the seat of government.

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The Respondents respectfully urge this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit in this proceeding.

PROCEEDINGS BELOW

Following the filing of the complaint in this case, the District Court *sua sponte* divided its proceedings into two segments. An Opinion and Order was entered for each segment. Both shared a common nucleus of operative facts. The District Court opinion directly resulting in the Petition for *Certiorari* is reported at 844 F. Supp. 1182 (S.D. Ohio 1993). It is also appended to the Petition at A13-A26;[1] the other opinion and order is reported on Westlaw at 1994 WL 749489 and is included in the Respondents' Appendix at RA1-RA10.[2]

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[1] References to the Appendices contained in the Petition are identified herein as A1, A2, etc. References to the Respondents' Appendices contained in the Brief in Opposition to a Writ of *Certiorari* are identified herein as RA1, RA2, etc. References to the Appendices included in this Brief of Respondents are identified as 1a, 2a, and 3a.

[2] The Respondents' Complaint and Amended Complaint raised two issues: one was related to erection of the Klan's cross on the same forum as the menorah; the other related to the denial of a permit to the Klan to hold a rally on Capitol Square in January 1994. Two hearings were set: one was primarily devoted to the cross issue, and the other was primarily devoted to the rally. References herein to the record include R. 9: TR I (record of hearing of December 20 and 21, 1993), and R. 23: TR II (record of the

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 30 F.3d 675 (6th Cir. 1994) and is appended to the Petition for *Certiorari* at A1-A12.

INTRODUCTION

The State asserts that the primary issue in this case is whether the Establishment Clause creates a flat ban on the private, unattended display of a Klan cross on a public forum open to all other political and religious communication where the forum is near the seat of government. The State's assertion is wrong. The record in this case makes clear that the

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morning portion of the hearing of January 3, 1994) and R. 23: TR III (record of the hearing of the afternoon of January 3, 1994). The December 20 and 21 hearings focused on injunctive relief regarding the cross which the District Court granted on December 21, 1993. A26. The January 3 hearing focused mainly on discriminatory treatment, injunctive relief related to the rally, and a claim for damages; the Court issued the injunction permitting the rally and denied damages. RA10, *Pinette v. Capitol Square Review and Advisory Board*, Case No. C2-93-1162, U.S.D.C. S.D. Ohio, Opinion and Order of January 4, 1994, (1994 WL 749489). The subject of the Petition before this Court is the injunction ordering the Petitioners to grant the permit to erect the Klan's cross; the State did not appeal the injunction ordering the State to grant a permit for the rally. The record of both hearings constitutes the record on appeal, together with a supplemental record from the District Court.

State's reliance on the Establishment Clause is pretextual. The State's objection to the Ku Klux Klan cross had much less to do with the cross than with the Ku Klux Klan itself. The discriminatory denial of access to a public forum under these circumstances is clearly prohibited by the First Amendment.

STATEMENT OF THE CASE

The Knights of the Ku Klux Klan filed this case on December 15, 1993 to challenge, *inter alia,* the discriminatory refusal of the Capitol Square Review and Advisory Board[3] to grant a permit allowing display of a Ku Klux Klan cross on the public forum on the west side of the Capitol Building in Columbus, Ohio. Hearings to consider the Plaintiffs' requests for injunctive relief were held on December 20-21, 1993 and on January 3, 1994. The order that is the subject of the Petition was entered on December 21, 1993.

a. Background

On October 29, 1993, prior to initiating this case, the Knights of the Ku Klux Klan had applied for a permit to hold a public assembly in the Capitol Square forum. The purpose of the public assembly,

[3] The Capitol Square Review and Advisory Board is alternatively referred to as the "Board" or the "State" in this brief.

which the Klan planned to hold the following January 15, 1994, was to express the organization's political views.

On November 18, 1993, while the application for the January 15th rally was still under consideration, the members of the Capitol Square Review Board met in executive session and discussed the issue of Ku Klux Klan access to the same forum during the holiday season. They feared that the Knights of the Ku Klux Klan might follow the example of another Klan group in Cincinnati by seeking to put up a Ku Klux Klan cross during the Christmas season. RA14, RA18; RA19-RA21. As a result of its discussion in executive session, the Board reconvened in public and voted *sua sponte* to bar display of both the State Christmas tree and the private display of the Lubavitch sect's menorah from Capitol Square during December 1993. A14. At the time, the Lubavitch Sect had not yet applied for its 1993 permit nor had the Klan yet sought a permit to erect a cross in Capitol Square. Nevertheless, the Petitioners decided to bar the Christmas tree and the anticipated Lubavitch display of its menorah solely to foreclose any claim to equal access that the Klan might present. RA12 (Plaintiffs' Exhibit 33, Broadcast No. 5).

The decision of the State to bar the tree and menorah resulted in a great public uproar. A statement was released by the Office of the Governor objecting to imposition of a ban on all symbols as a means to prevent display of a Klan cross. According to the statement, the "[p]eople of this great State think that we ought to have a Christmas tree and

think that we ought to have a menorah at the Statehouse and so do we. We've had a Christmas tree at the Statehouse for tens of years and you can't let a single group or groups of people dictate to the people of Ohio what they are and aren't going to do." RA14 (Plaintiffs' Exhibit 33, Broadcast No. 6, Statement of Mike Dawson, Press Secretary to the Governor.) Newspaper accounts described the Governor as "disappointed and upset." RA20 (Defendants' Exhibit D, *The Columbus Dispatch*, November 20, 1993, front page). The Governor was also quoted as saying: "The Board's initial decision was a mistake. I trust this matter will be resolved quickly." *Id.*

Consistent with these public statements, the Governor and the other State officials who appoint the members of the Board[4] signed and delivered to the Board a letter calling upon the Board to permit the tree and menorah. *Id.*; RA14; RA19-RA20; JA 167-168, TR I 94. The Board met in special session on November 23, 1993 and resolved into executive session. Immediately following the executive session, the Board reconvened in public to formally declare its earlier vote invalid. In addition, it approved the State display of its Christmas tree and the private display of a menorah by a nine-to-zero vote. A15; JA 167-168, TR I 94. The vote to approve both the Christmas tree and the menorah was made even though no permit applications for displays on the Capitol Square had been filed. The reason for the change in vote was explained by Board Chairperson

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[4] Ohio Revised Code Section 123.022.

Richard Finan (a Petitioner herein): "I've been in politics for twenty-one years. When you get a letter from the Governor, the Speaker, and the President of the Senate, you do respond," he said. RA16 (Plaintiffs' Exhibit 33, Broadcast No. 8).

b. Capitol Square Public Forum

The public forum in question is a large park-like area, a block wide, on one side of the State Capitol building in Columbus.[5] Temporary, unattended[6] displays have been permitted in the public forum for many years. For example, the State of Ohio has erected a Christmas tree annually and has hung a "Seasons Greetings" banner from two of the Statehouse's pillars. 2a. The Lubavitch sect has been granted annual permits to display a large Chanukah menorah in Capitol Square. A14. And, permission has been granted for secular displays, such as United

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[5] The forum area at issue in this case is one city block wide and approximately 240 feet deep, JA 96-97 (Stipulations, ¶ 12), about 3½ acres. The entire Capitol Square block consists of ten acres, some 435,600 square feet. REDI REALTY ATLAS, City Map Volume I (22nd ed. 1991) p. 397. Views of the public forum are included at Brief of Petitioners, Appendix, at 1a (Plaintiffs' Supplemental Exhibit 104), 3a, (Plaintiffs' Supplemental Exhibit 106), JA 64 (Defendants' Supplemental Exhibit 109), and JA 65 (Defendants' Supplemental Exhibit 110).

[6] As used in this brief, "unattended" means that the given display has been permitted to remain at least overnight without accompanying personnel or ongoing ceremonies.

Fund campaign "thermometers" and arts festivals exhibits and booths. JA 159-160. There is no rule or regulation that confines unattended displays to any particular time of year, and they have in fact been present at various times over the years. A16.

In addition to these unattended displays, Capitol Square has been the site of numerous speech activities including gay rights demonstrations, anti-war demonstrations, and religious rallies and marches. A18. It is undisputed that Capitol Square has "been used from time immemorial for all manner of public gatherings and demonstrations by groups of all kinds, including political parties, charitable and religious groups, labor unions, civil rights groups and the proponents and opponents of all manner of social and political issues." RA6. As the District Court summarized the record, the Capitol Square "grounds have been made available for speeches and public gatherings by various groups advocating various causes both secular and religious." A14.

c. Administration of the Capitol Square Forum

The Capitol Square Review and Advisory Board is authorized by law to regulate the uses of Capitol Square. Ohio Revised Code Section 123.022. According to Section 128-4-02 of the Ohio Administrative Code, "Capitol buildings and grounds are available for use by the public . . . for free discussion of public questions" if the applicant adheres to a stated

procedure for requesting such use, and if the proposed use:

> (1) Does not interfere with the primary use of the capitol buildings or grounds;
>
> (2) Is appropriate to the physical context of the capitol buildings or grounds;
>
> (3) Does not unduly burden the managing authority;
>
> (4) Is not a hazard to the safety of the public or state employees; and
>
> (5) Does not expose the state to the likelihood of expenses and/or damages which cannot be recovered.

A32 (Report and Recommendation of Hearing Examiner, Conclusions of Law, ¶ 2).

Ronald Keller, Executive Director of the Board, is responsible for management of the Capitol Square complex. In this capacity, he grants and denies permits for the use of Capitol Square. TR I 84-85; JA 97, Stipulations, ¶ 19. Persons desiring to use Capitol Square submit their requests on the Board's form, "Application For Permit to Use Statehouse Grounds." JA 99, (Stipulations, ¶ 27-28); JA 103-111 (Exh. 3,4).

d. Display of the Menorah and the Tree

On November 29, 1993, Rabbi Chaim Capland submitted an official application for the display – previously approved by the Board – of a menorah on Capitol Square from December 8 through December 16, 1993 to coincide with the days of Chanukah. Keller issued Capland's permit on November 29, 1993, the same day the application was submitted. A15, JA 168-169, TR I 97-98. The menorah was erected at the Capitol Square on December 8, 1993.

The State Christmas tree was erected on December 7, 1993. A16.

e. Denial of a Permit to Display the Ku Klux Klan Cross

The Klan's application for a permit to display its cross on the Capitol Square forum from December 8 through December 24 was also submitted on November 29, 1993. A15. The period covered by the application overlapped the period during which the menorah would be displayed. Executive Director Keller denied the Klan's application by letter of December 3, 1993. *Id.* Mr. Keller wrote that:

> [The denial] . . . was made upon the advice of counsel, in a good faith attempt to comply with the Ohio and United States Constitutions, as they have been interpreted in relevant decisions by the Federal and State Courts. We would direct your attention in particular to controlling decisions recently

> rendered by the United States Supreme Court under the First Amendment to the United States Constitution.

JA 91-93 (Plaintiffs' Exhibit 5); A15 (District Court Findings of Fact, ¶ 9).

The Klan filed an administrative appeal of the permit denial. Although the administrative appeal was denied on December 21, 1993, the hearing examiner concluded that:

> The evidence adduced at the [administrative] hearing in this matter does not offer a complete explanation of the process or basis for the Board's denial of the Appellant's request. Board Executive Director Keller did, however, advise the Appellant that the Board denied its request on advice of counsel, who had raised constitutional objections to the request. . . .

A33 (Report and Recommendation of Hearing Examiner, Conclusions of Law, ¶ 4).

Respondents had filed the instant action prior to the issuance of the hearing examiner's report. On December 21, 1993, following the report, the District Court issued a permanent injunction ordering the State to grant a permit which would allow the Klan to display its cross through December 24. Pursuant to that injunction, the cross was set in place in the early morning hours of December 22, 1993. RA24-RA30 (Plaintiffs' Supplemental Exhibits 102, *The Columbus Dispatch*, December 23, 1993, front page, and 103, *The [Akron] Beacon Journal*, December 23, 1993, page B5). It was vandalized a short time later. RA28-

RA29, RA31. Meanwhile, on December 22 the Board granted permits to several religious groups that applied to display crosses around the Klan Cross; the purpose of those crosses was to protest the presence of the Klan cross.

f. The Menorah as a Religious Symbol

At the hearing before the District Court, Cantor Jack Chomsky of Tifereth Israel Congregation in Columbus, Ohio testified that the menorah permitted by the State of Ohio, like other Chanukah menorahs, "is a religious symbol. It is used in conjunction with fulfilling the obligations incumbent upon a Jew for the celebration of the festival of Chanukah." JA 152, TR I 70. Cantor Chomsky explained that Jews have an obligation to "put candles in it as appropriate, as prescribed by our tradition, and they recite blessings which state as part of the blessings that we were commanded to perform this act. Blessings such as this make this into very much a ritual act." JA 155, 75-76. Rabbi Harold Berman also stated that the menorah "is a religious symbol. . . . " JA 53.

g. The Klan Cross

Plaintiff Carr testified that he applied for a permit to display the Klan cross because he had heard that the State was going to permit a tree and a menorah but not a Klan cross. JA 134-137, TR I 42-44. Mr. Carr said that his motivation for filing the request was that "since we were being excluded by

the city or the state, the Capitol Square Review and Advisory Board, that we would attempt to obtain a permit to erect a cross for the Christmas season." *Id.* Mr. Carr also testified that while the cross communicates a religious message, it also conveys a political message: "To us, it is a sacred symbol, but it is also a symbol of going against tyranny, a symbol of freedom." JA 142, TR I 51. He noted that the "Klan's use of the cross originated from the early Scottish clans in Scotland in the 1300's which used the cross as a symbol to rally the clans together to fight against their English oppressors." JA 143. And Mr. Carr observed "the cross was also incorporated in the Confederate battle flag. . . . " JA 150.

In addition, counsel for the Klan informed the State that accompanying the cross would be a disclaimer stating that "this cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." A15-16.[7]

h. The Opinion of the District Court

In granting the injunction, the District Court found that the area in question was a traditional public forum, A18, that there was no policy against free-standing displays in Capitol Square, and that for

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[7] Counsel for the Klan also invited State suggestions concerning the content of the disclaimer. *Id.*

many years a variety of unattended displays have been permitted on Capitol Square for limited periods, including, during December, a free-standing Christmas tree and a free-standing menorah. A16.

The Court observed that one of the Board's reasons for denying the Klan's application – the purported failure of the Klan to post a bond – was "not a proper ground for the denial of the permit . . . " and that the State "does not contend that the erection of a cross poses a security risk of any kind." A16. The Court concluded, based on all of the facts, that "the State of Ohio is in no way associating itself with the Klan's display," that there was no appearance of endorsement of religion, and that "the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism" in the public forum. The Court then held that "freedom of speech would be meaningless if it did not apply to all groups, popular and unpopular alike." A26.

i. The Opinion of the Sixth Circuit

The Sixth Circuit affirmed the District Court on Free Speech, Free Exercise, and Equal Protection grounds. A6-A7, A11-A12. It rejected the Petitioners' claim that there was any endorsement of religion by the State in this case. Instead, it held that a reasonable observer could not conclude that the display of the Ku Klux Klan cross on Capitol Square was a state

endorsement of religion. It also concluded that religious groups and groups communicating controversial or offensive messages could not be selectively denied access to a public forum in the name of the Establishment Clause. A11-A12.

SUMMARY OF ARGUMENT

The Free Speech and Free Exercise Clauses of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment require a state to permit the temporary unattended display of a Ku Klux Klan cross in a traditional public forum that is open to other political and religious symbols – even if that forum is near the seat of government – absent any special indicia of endorsement.

1. The State's discriminatory refusal to permit the display of the Ku Klux Klan cross in a traditional public forum where the State has permitted other secular and religious symbols violates the Free Speech and Free Exercise Clauses of the First Amendment.

In this case, the State has singled out the Ku Klux Klan and has refused to permit the Klan to display its cross in the Capitol Square forum. The cross is symbolic of the Klan's view about politics and religion.

The record establishes that the denial was based upon the controversial communication of a controversial speaker. On that record, the State clearly discriminated among political and religious symbols. Moreover, the discrimination was unlawfully accomplished by means of standardless procedures permitting the exercise of unbridled discretion.

The State's only response to the claim of discrimination is that the Board relied upon the Establishment Clause; however, this explanation rings hollow given the State's tolerance of other religious symbols at the same site.

2. Given the facts of this case, both courts below correctly held that no reasonable observer could conclude that the Ku Klux Klan display of its cross on the Capitol Square public forum constituted an endorsement or appearance of endorsement of religion.

The State erroneously insists that, because of the inherent power of an unattended cross as a symbol, the Establishment Clause automatically bans from the Capitol Square forum the unattended display of the Klan cross at any location at any time under any circumstances. This flat ban is wrong as a matter of law precisely because it forecloses consideration of all relevant facts and circumstances.

The State's contention that the Establishment Clause flatly bans all symbols alleged to be "purely religious" precludes the application of the "reasonable observer" standard set forth by this Court in *County of Allegheny v. Greater Pittsburgh ACLU*, 492

U.S. 573 (1989) and followed by the courts below. While the State claims that banning the Klan cross is necessary to serve its interest in obeying the Establishment Clause, it ignores its parallel obligation to fulfill the requirements of the Free Speech and Free Exercise Clauses. These interests must be reconciled on a case-by-case basis by use of the "reasonable observer" standard.

The State fails to acknowledge that providing a public forum is not an endorsement of the speech thereon. It also ignores the distinction, recognized in *Allegheny*, between private religious expression in a public forum and government religious expression.

3. Privately sponsored displays of religious symbols cannot be excluded from a quintessential public forum even at the seat of government, absent some indicia of state endorsement. Indeed, the defining characteristic of a public forum is that the state may not discriminate against speech on the basis of content.

Respondents do not quarrel with the endorsement test under the Establishment Clause as it has been developed by this Court. But, endorsement cannot be presumed from the mere fact of private speech in a public forum. Yet, without this inference, there is no plausible claim of endorsement on the facts of this case, as both lower courts found. The judgment below should therefore be affirmed.

ARGUMENT

I. THE STATE'S DISCRIMINATORY REFUSAL TO PERMIT DISPLAY OF THE KU KLUX KLAN CROSS IN A TRADITIONAL PUBLIC FORUM VIOLATES THE FREE SPEECH AND FREE EXERCISE CLAUSES OF THE FIRST AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The record in this case clearly establishes that officials of the Capitol Square Review and Advisory Board persistently engaged in a series of discriminatory actions to prevent the Ku Klux Klan from displaying the Klan cross in the public forum at Capitol Square. The maneuvering began after the Ku Klux Klan filed an application to hold a rally at Capitol Square on the birthday of Martin Luther King, Jr. On October 29, 1993, the Board received, but did not act upon, the Klan's permit request. Then, on November 18, 1993, Board Chairman Richard Finan conceded that there was no legal basis to prevent the Klan from holding its rally. RA11.[8] The Board's attention shifted to efforts to forestall the possibility that the Klan might obtain a permit to erect a Klan cross in Capitol Square, because similar applications had been filed in Cincinnati by another Klan group. RA12.

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[8] The Board did not issue a permit for the Klan rally until ordered to do so by the District Court on January 4, 1994. RA1.

The Capitol Square Review and Advisory Board announced its strategy to forestall possible display of the Klan cross on November 18, 1993. On that date, Board officials stated that the traditional state Christmas tree would not be erected in the Capitol Square during the 1993 Christmas season. They also stated that the Board would not allow the Lubavitch sect to display a menorah that had been permitted in previous years.

The Board's initial strategy crumbled on November 23, 1993, after vigorous public protests and after strong political pressure from the Governor and legislative leaders who appointed the members of the Board. In response to this pressure, the Board suddenly changed course and agreed to permit the menorah and to display the tree. A15; JA 167-168. A few days later, Rabbi Capland applied for a permit to erect the Lubavitch menorah. His permit was granted the same day. A15.

The Board's change of position, which was reported in detail by the press, caused Donnie Carr to file a permit application to display the Klan cross. According to Carr, the permit application was filed to protest the Board's gratuitous policy of denying Klan access to Capitol Square while granting access to the Lubavitch sect. During his testimony at the hearing below he explained that "since we were being excluded by the City or the State, the Capitol Square Review and Advisory Board, that we would attempt to obtain a permit to erect a cross for the Christmas season." JA 136-137.

A. The Constitution prohibits discrimination based on political or religious viewpoint.

It was against this record detailing the State's plan to bar the Klan cross that the Court of Appeals for the Sixth Circuit concluded, in a gross understatement, that "there was no indication that Ohio treated the Klan or its display favorably." A10. Indeed, as the Circuit made clear, this case has much less to do with endorsement of the Klan's speech than with discrimination against it. Thus, it commented: "Zealots have First Amendment rights too. Some speech may be distasteful, unpopular and outright offensive, but as Thurgood Marshall so persuasively wrote, the protection found in the First Amendment does not depend on popular opinion[.]" A11. The Sixth Circuit underscored its point by quoting Justice Marshall's statement in *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972):

> Necessarily then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from

> assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

A11-A12 (30 F.3d at 680), 408 U.S. at 96 (footnote omitted by the Circuit).

This Court has consistently restated this principle in cases decided since *Mosley*. For example, in *Carey v. Brown*, 447 U.S. 455, (1980), this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open.' " *Id.* at 462-63, quoting *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964). Similarly in *R.A.V. v. St. Paul*, ___U.S.___, 112 S. Ct. 2538 (1992), this Court stated, "The First Amendment generally prevents government from proscribing speech, see, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 309-311 (1940), or even expressive conduct, see *e.g. Texas v. Johnson*, 491 U.S. 397, 406 (1989), because of disapproval of the ideas expressed. Content based regulations are presumptively invalid." 112 S. Ct. at 2542. According to *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), " . . . the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Id.* at 745-46.

B. The State's Establishment Clause claim is a pretext for discrimination.

Faced with this overwhelming authority, the State fails to address whether its efforts to prevent display of the Klan cross were motivated by the unpopularity of the Ku Klux Klan and its symbol. Instead, the State prefers to argue that its efforts to prevent display of the Klan cross were motivated solely by a desire to avoid an Establishment Clause violation. According to the State's brief, display of the Klan cross at Capitol Square conveys the "message of government imprimatur of religion" because it is a Latin Cross which, in turn is the symbol of Christianity. Pet. Br. 12-17.

The disingenuousness of the State's Establishment Clause claim is patently apparent. First, contrary to the State's assertion, the Klan itself clearly regards the cross as both a political symbol and a religious symbol. Second, even if it is assumed that the Klan cross is a purely religious symbol, the State may still not discriminate against it nor engage in "maneuvers to bring about a legal ascendancy of one sect over another." Thomas Jefferson, *Letter to Elbridge Gerry*, January 26, 1799, reprinted in SAUL K. PADOVER, A JEFFERSON PROFILE (1956) 112. Yet, the evidence of discrimination on this record is undeniable. When the menorah was erected in December of 1993, the governor participated in the lighting ceremony. RA23 (*The Columbus Dispatch*, December 9, 1993). In addition, the menorah has been displayed without state objection for several years. Unlike the permit

application for the Klan cross, the application for the menorah was approved in advance of the day it was filed.

Under this Court's well-established precedents, the State may not permit the menorah and bar the cross by selectively invoking the Establishment Clause. For example, in *Niemotko v. Maryland*, 340 U.S. 268 (1951), the Court unanimously struck down the discriminatory refusal of government officials to allow a Jehovah's Witness group from holding a bible meeting in a public park. Similarly, in *Fowler v. Rhode Island*, 345 U.S. 67 (1953), this Court found that the First Amendment was violated when a Jehovah's Witness religious service was treated differently than those of Catholics or Protestants. *Id.* at 69-70.

In *Larson v. Valente*, 456 U.S. 228 (1982), this Court underscored the constitutional prohibition against discrimination among religions. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Id.* at 244. And, as this Court stated in *Allegheny*, "[w]hatever else the Establishment Clause may mean . . . , it certainly means that at the very least that government may not demonstrate a preference for one particular sect or creed. . . . " 492 U.S. at 605.

The State's discriminatory motives were highlighted by the Capitol Square Review and Advisory Board's use of *ad hoc* procedures designed to obstruct Klan access to the Capitol Square. The Board's vacillation over whether to impose a flat ban on all

unattended displays at Capitol Square during the Christmas holidays was justified by no published rule or regulation. Nor was any rule or regulation cited as a basis for the anticipatory denial of a permit for the display of the Klan cross.

The *ad hoc* quality of the Board's permit denial in this case was noted in the findings of the Board's administrative hearing officer. According to these findings:

> The evidence adduced at the [administrative] hearing in this matter does not offer a complete explanation of the process or basis for the Board's denial of the Appellant's request. Board Executive Director Keller did, however, advise the Appellant that the Board denied its request on advice of counsel, who had raised constitutional objections to the request. The record does not establish whether other objections were raised by the Board's counsel. A33, ¶ 4.

The standards applied to the Klan are thus unpublished and unknown. The use of such *ad hoc* procedures to facilitate discrimination against disfavored speakers is forbidden by the First Amendment. *Forsyth County, Ga. v. Nationalist Movement*, ___ U.S. ___, 112 S. Ct. 2395 (1992); *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

The rule against discrimination is thoroughly consistent with the command of this Court, more than fifty years ago, that no public official "can

prescribe what shall be orthodox in politics [or] religion . . . ," *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). The decisions of the District Court and the Court of Appeals were based on this command and therefore should be affirmed.

II. NO REASONABLE OBSERVER COULD CONCLUDE THAT THE KU KLUX KLAN DISPLAY OF ITS CROSS IN THE CAPITOL SQUARE PUBLIC FORUM CONSTITUTED STATE ENDORSEMENT OR THE APPEARANCE OF STATE ENDORSEMENT OF RELIGION

The State defends its discriminatory conduct in this case by contending that the Ku Klux Klan cross can never be displayed on the public forum near the Ohio Capitol building because such a display automatically constitutes an establishment of religion. According to the State's brief, the unattended display of the Klan cross on Capitol Square violates the Establishment Clause because "[t]he combination of symbols representing church and state conveys too powerful a message that can easily be misunderstood. . . . " Pet. Br. 12. The State's contention presumes that when a cross is privately displayed on a public forum, the Establishment Clause forecloses analysis of the specific facts and circumstances related to the display. This position is wrong as a matter of fact and as a matter of applicable law.

A. Display of the Klan cross created no appearance of state endorsement.

The State's contention that the Ku Klux Klan's display of its cross on Capitol Square created the appearance of an endorsement of religion is wrong as a matter of fact because it completely ignores the record in this case. The record establishes that no reasonable observer could have concluded that there was any endorsement of the Klan's display by the State.

The State's vigorous public opposition to display of the Klan cross underscored the absence of any endorsement of the Klan's cross. The record also makes clear that the public was aware of the distinction between the Ku Klux Klan symbol and the State of Ohio. Indeed, the Klan cross was destroyed by unknown individuals within a short time after it was erected. Moreover, local ministers surrounded the site of the Klan cross with crosses of their own as a protest against its presence. RA24-RA30, RA31, 2a.

Under such circumstances, the State's claim that the public was unable to separate the Klan's message from that of the State is simply not credible.

B. Both Courts below correctly measured the particular facts and circumstances of this case against the constitutional standards articulated by this Court.

The principal legal error in the argument made by the State is that the unattended display of the Ku

Klux Klan cross at Capitol Square is an automatic violation of the Establishment Clause. The State rests its erroneous argument on the claim that the Klan cross is a "purely religious symbol" and is therefore not entitled to the same access to public fora as other religious symbols, like a privately displayed menorah. In making this argument the State misapplies the fact-sensitive tests articulated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), to determine whether display of the Klan cross constitutes an establishment of religion.

The opinion of the Court of Appeals in this case articulated this Court's standards for measuring whether an Establishment Clause violation has occurred:

> For a government display of a religious symbol to pass constitutional muster, the display must: 1) have a secular purpose; 2) neither advance nor inhibit religion in its principal or primary effect; and 3) "not foster 'an excessive entanglement with religion.' " *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970). The *Lemon* test has subsequently been refined to ask whether a reasonable observer would view the disputed display as a government endorsement of religion.

A7. These standards require the careful evaluation of all relevant facts and circumstances in each individual Establishment Clause case as a prerequisite

for determining whether the government has actually endorsed or appears to endorse religion.

The Court of Appeals applied the foregoing standards to the display of the Klan cross in this case and correctly concluded that no endorsement of religion had occurred. In reaching this conclusion, the Court of Appeals relied on the distinctive facts of this case. It treated the factors of private ownership of the Klan cross and the location of that cross as extremely important. In addition, contrary to the contention of the State, the Court made clear that the private display of the cross in a public forum did not automatically avoid an Establishment Clause violation. All surrounding facts and circumstances were taken into account. This was underscored by the Court's reliance on its decision in *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (*en banc*), which states that private display of a religious symbol in a public forum is not "automatically determinative" of Establishment Clause questions. *Id.* at 1545.

In applying the endorsement test to the record in this case, both courts below took into account all of the surrounding facts and circumstances. In particular, the District Court found that for many years "displays have been placed upon the Capitol Square for limited periods during the month of December. These have included a Christmas tree and a free standing Chanukah menorah. . . . " A14, ¶ 5. During the year in which this controversy arose, the menorah was to be on display from December 8-16, 1993. A15, ¶ 8. The tree was twenty feet high. By contrast,

the Court found that the cross would be "10 feet high, six feet across, made from two by six lumber, painted white, secured upright by a free standing tripod." A15, ¶ 11. The Court further noted that the contents of the accompanying disclaimer of state endorsement, while open to some negotiation, would essentially state "this cross was erected by private individuals without government support for the purpose of expressing respect for the holiday season and to assert the right of all religious views to be expressed on an equal basis on public property." A15-A16. ¶ 11. Finally, the Court noted that other free-standing displays had been permitted on other occasions for limited periods of time. A16, ¶ 13.

Based on these facts, the District Court concluded that "the State of Ohio is in no way associating itself with the Plaintiffs' display." It said that consideration of all of the facts, including the aggressive opposition to the display by elected officials of the State, would not suggest to a reasonable observer that the State was in any way endorsing the display. Considering the cross, the menorah, and the Christmas tree, the District Court held – directly contrary to the State's assertion here – that "the reasonable observer should conclude that the government is expressing its toleration of religious and secular pluralism." A25.

C. The decisions below are consistent with *County of Allegheny v. ACLU.*

The conclusion of both lower courts in this case that display of the Ku Klux Klan cross in Capitol Square did not violate the Establishment Clause is consistent with *County of Allegheny v. ACLU, supra.* In *Allegheny,* this Court considered the constitutionality of two recurring displays on public property in downtown Pittsburgh. The first display was a creche placed on the Grand Staircase inside the Allegheny County Courthouse. Accompanying the creche was a banner stating *"Gloria in Excelsis Deo."* The second display was a Chanukah menorah placed outside the City-County Building, next to a Christmas tree and a sign stating "A Salute to Liberty."

The *Allegheny* Court engaged in a careful review of the facts and circumstances surrounding both displays and concluded that the Establishment Clause required that each of the two displays be treated distinctly. The Court found that the creche display violated the Establishment Clause because, among other things, the creche was located inside the building in the "main" and "most beautiful part." Accordingly, "[n]o viewer could reasonably think that it occupies this location without the support and approval of the government." 492 U.S. at 598-99. On the other hand, the Court held that the display of the Chanukah menorah outside of the City-County Building was not a violation of the Establishment Clause. This was because the menorah was on the outside of the building at an entrance and was an

integral part of an overall display that included a Christmas tree and the sign saluting liberty. The Court explained that "the city's overall display must be understood as conveying the city's secular recognition of different traditions for celebrating the winter-holiday season." 492 U.S. at 620.

Here, the Klan cross was not erected inside of any state building. It was not part of any State approved display. And most obviously, the Klan cross is one of the most unpopular symbols in American history – a symbol that Ohio officials did everything in their power to exclude from government property.[9] Furthermore, the Klan cross was accompanied by a sign explicitly characterizing it as a private display. The State's brief erroneously dismissed the significance of the disclaimer. While a disclaimer may not be enough to overcome other strong evidence of endorsement – such as preferential treatment with regard to size, location or elevation – it is surely part of the setting to be considered in an Establishment Clause case when there is no countervailing evidence of endorsement. Nothing in *Allegheny* is to the contrary. Moreover, the message of the Klan's disclaimer was reinforced by the State's own display of a "SEASONS GREETINGS" banner behind and above the State Christmas tree, and roughly equidistant from the December 8-16 site of the menorah and the December 22 site of the cross.

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[9] The cross as used by the Klan is generally understood to express views of racial supremacy. *R.A.V., supra*, 112 S. Ct. at 2548, 2571.

1a, 2a, 3a. The banner, which was stretched between two columns of the State Capitol Building, 2a, was far less specific and far less focused than the sign approved by this Court in *Allegheny*. Thus, if the State's banner was sufficient to negate State endorsement of the menorah, it would do no less for the Klan cross.

More generally, the State's reliance on *Allegheny* is fundamentally flawed. According to the State, *Allegheny* stands for the proposition that the display of a cross on a public forum near the seat of government automatically violates the Establishment Clause because the cross is such an inherently religious symbol that no observer can help but assume that the government endorses it. The State contends that the cross is inherently so religious that it cannot be displayed unattended, no matter the circumstances, no matter the Klan ownership, because there is an innate "inability of an observer to separate the state from the message of the Latin cross. . . . " Pet. Br. 17, 31-35.

Allegheny, of course, was not a case about traditional public fora, 492 U.S. at 600 n.50, and it did not adopt the *per se* rule regarding public fora that the State now advocates. On the contrary, *Allegheny* requires that in Establishment Clause litigation, a careful evaluation of facts and context must be made on a case by case basis. If the State's position were correct, then members of the community confronted with the Klan cross at Capitol Square must be presumed to be unable to make an informed judgment about the significance of its message because it is on

public property. Such a presumption leaves no room for routine time, place and manner regulations that make the absence of state endorsement obvious. The presumption also flies in the face of the robust public efforts of Ohio officials in this case to keep the Klan cross off of state property because they found its message so offensive.

D. The State misrepresents the significance of the Menorah and the Klan cross.

At the crux of the State's argument is the claim that the Latin cross is so central to Christianity that the sole message it communicates is a religious one. According to this claim, the Establishment Clause purportedly creates a compelling state interest which justifies a ban against the display of the Klan cross on Capitol Square. Pet. Br. 45-49. Thus, the State asserts that the cross is incapable of communicating a secular message along with its religious message. The State contrasts the message of the cross with the message of the Chanukah menorah which it contends can be displayed near the seat of government because a secular message always accompanies the menorah's religious message.

In order to make its claim that the Klan's display of its cross communicates a purely religious message, the State's argument studiously ignores the record in this case. It is undisputed that the Ku Klux Klan intended to convey a threefold message by displaying its cross on Capitol Square. First, according to Ku Klux Klan official Donnie Carr, the cross

erected by the Klan is obviously "a sacred symbol." JA 142. Second, " . . . [I]t is also a symbol of going against tyranny, a symbol of freedom. . . . [T]he Ku Klux Klan's use of the cross originated from the early clans in Scotland in the 1300s which used the cross as a symbol to rally the clans together to fight against their English oppressors." JA 143. Third, the Klan sought a permit to erect its cross as a protest against the discriminatory decision of the Capitol Square Review and Advisory Board to grant a permit to display a menorah while barring access to the Klan's symbol. JA 135-136.

The State's contention that display of the Klan's cross is purely religious is baseless. The argument rejects the other messages that are also communicated by the cross.[10] Basing a permit denial on such a contention violates First Amendment protections of freedom of speech and free exercise of religion. The Klan is entitled by the First Amendment to select the messages that the group wishes to communicate. It is not the business of the government to tell the Klan what to say or how to say it. This point was made clear in *Texas v. Johnson*, 491 U.S. 397 (1989). There the Court stated,

> We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its

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[10] *See, e.g.*, the religious and secular messages of various symbols set forth in the Brief of Liberty Counsel *Amicus Curiae* in Support of Respondents, Appendix A.

> adherents. . . . To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernable or defensible boundaries. . . . To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

Id. at 417.

The State's inappropriate insistence on defining the significance of the Klan cross as purely religious is accompanied by a similarly inappropriate insistence on defining the menorah as a secular symbol when displayed at Capitol Square. Pet. Br. 32-33. Such a suggestion implies that the menorah is less of a religious symbol than the cross. Cantor Jack Chomsky made this clear at the hearing below, when he observed, "I regard the menorah as a religious symbol. It is important in its use to perform a religious obligation, and I take exception to the suggestion that it is not a religious symbol." TR I 70-71.

Moreover, the State's position is self-contradictory. If the State of Ohio is correct in its assertion that the menorah "has a secular component because it has become the representative symbol of the Chanukah season," Pet. Br. 32, the development of this secular component has been achieved in large part through its frequent display during that holiday season on quintessential public fora. *Allegheny*; *Americans United v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992); *Congregation Lubavitch v. City of Cincinnati*,

997 F.2d 1160 (6th Cir. 1993); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (*en banc*); *Flamer v. City of White Plains, N.Y.*, 841 F. Supp. 1365 (S.D. N.Y. 1993). The State's position appears to be that the menorah, having achieved such status, may be grandfathered into Capitol Square. Another symbol, the Klan cross, is classified as permanently and incurably religious and for this reason is denied the use of a quintessential public forum.

E. The State's reliance on lower court cases is misplaced.

1. The State's reliance on lower court cases does not distinguish between private religious speech on public fora and religious expression by the government itself.

In its brief, the State erroneously contends there is a "battery of cases" that holds the display of a cross on public property is an automatic establishment of religion. Pet. Br. 16-17. The error arises from the fact that the State consistently fails to distinguish between cases involving private religious expression in a public forum and religious expression by government itself. For example, in *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265 (7th Cir. 1986), *cert. denied*, 479 U.S. 961 (1986), the cross at issue was displayed on a government building. In *Gonzales v. North Township of Lake County*, 4 F.3d 1412 (7th Cir. 1993) the crucifix was a permanent structure that was actually deeded to the township. The 65

foot high illuminated cross enjoined in *Jewish War Veterans v. United States*, 695 F. Supp. 3 (D.D.C. 1988), was also a permanent structure. Similarly, in *American Civil Liberties Union v. Rabun County Chamber of Commerce*, 698 F.2d 1098 (11th Cir. 1983), an injunction was granted to preclude a cross that had been on permanent display in a State park for 30 years. In *Libin v. Town of Greenwich*, 625 F. Supp. 393 (D. Conn. 1985), there was an illuminated cross on a fire house and in *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065 (M.D. Fla. 1989), the cross was on the City's water tower. In all of these cases the crosses were affixed to governmental property or sponsored by governmental entities. And, of course, *Harris v. City of Zion*, 927 F.2d 1401 (7th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3054 (1992), and *Friedman v. Board of County Commissioners*, 781 F.2d 777 (10th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1169 (1986), involved crosses used in an official capacity on local government seals. None of these cases involved a temporary private display of a cross in a public forum.

2. *The State's reliance on lower court decisions that ban private display of religious symbols on public fora are unpersuasive on these facts.*

The State of Ohio has argued to this Court that the decisions of the Courts of Appeals in *Kaplan v. City of Burlington*, 891 F.2d 1024 (2nd Cir. 1989), and *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990), provide the proper rule of decision for the

display of unattended religious symbols in public fora. In *Kaplan*, the unattended symbol to be displayed was a menorah; the proposed site of display was City Hall Park, a 2 1/2 acre traditional public forum located in front of the City Hall of Burlington, Vermont. In *Smith*, the unattended symbol to be displayed was a Nativity scene; the proposed site was a traditional public forum, the front lawn of the County office building. In each case the Court of Appeals found that the unattended solitary display of a religious symbol by a private group would violate the Establishment Clause.

The State's reliance on these cases is misplaced for several reasons. First, to the extent that these decisions create a flat ban on all private religious symbols in any public forum near a government building, they are inconsistent with the Court's repeated emphasis on the facts in its Establishment Clause jurisprudence. Second, to the extent that *Kaplan* and *Smith* rest on their particular facts, the factual findings in this case are critically different. Specifically, both courts below found that the placement of a Klan cross in Capitol Square under all the circumstances of this case did not create a substantial risk of misperceived state endorsement. Third, neither *Kaplan* nor *Smith* involves the sort of discrimination among religious symbols that dominates this record.

Having barred the solitary display of the menorah in *Kaplan*, one would not expect the Second Circuit to render a decision approving the solitary display of a Nativity scene or a cross. Similarly, one

would not expect the Fourth Circuit to authorize display of a menorah, having ruled against display of the Nativity scene in *Smith*. By contrast, the position urged by the State of Ohio lacks this basic integrity because the State saw fit to bar only one religious symbol, the cross, while facilitating the display of the menorah. Thus, *Kaplan* and *Smith* are no authority for the discrimination practiced by the Capitol Square Review and Advisory Board.

Given the record in this case, the State's argument that the Establishment Clause automatically forbids display of a Ku Klux Klan cross on a public forum near the seat of government is insufficient to overcome the Respondents' right to freedom of speech and free exercise of religion. Both of the lower courts that have considered this case have rejected the State's argument because the record makes clear that there is no realistic danger the community would consider the Klan's display of its cross to have been endorsed by Ohio officials. Neither court was persuaded that the State had any interest sufficient to allow the State to grant a permit to a congregation of Lubavitch Jews to display a large, electrified menorah while denying a permit for a much smaller free-standing Ku Klux Klan cross.

III. THE ESTABLISHMENT CLAUSE DOES NOT REQUIRE A FLAT BAN ON ALL PRIVATELY SPONSORED DISPLAYS OF RELIGIOUS SYMBOLS IN A QUINTESSENTIAL PUBLIC FORUM, EVEN AT THE SEAT OF GOVERNMENT WHEN THERE IS NO EVIDENCE OF ENDORSEMENT

The flat ban advocated by the State is inconsistent with this Court's public forum doctrine. As noted above, the question of when and whether the government has impermissibly endorsed religious speech is a contextual one that inevitably depends on a careful evaluation of the totality of circumstances. Here, there has clearly been no explicit or implicit endorsement of the Klan cross. To the contrary, the State has done virtually everything it could to distance itself from the Klan and prohibit the display of its cross in Capitol Square. Nor is this a case in which government endorsement of the cross can be inferred based on some form of preferential treatment. The Klan did not seek from the government, and did not receive from the courts below, any special benefit in terms of the size, placement or duration of its display. Accordingly, the State's only basis for challenging the decision below is the theory that *any* unattended display of a private religious symbol in a quintessential public forum violates the Establishment Clause, at least if the public forum is located near the seat of government.

For more than half a century the Court has recognized the public forum doctrine, *Hague v. CIO*, 307 U.S. 496, 515 (1939), and has held that peaceful

expression at the site of State government is an exercise of "basic constitutional rights in their most pristine and classic form." *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). The public forum doctrine embraces religious speech as well as nonreligious speech. *See Niemotko v. Maryland*, 340 U.S. 268 (1951). Indeed, the contention that religious speech or symbols can be categorically barred from a public forum is at odds with the very notion of a public forum.

The public forum doctrine, now well into its sixth decade, holds that:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

Hague, 307 U.S. at 515. In concluding that Capitol Square is a quintessential public forum, the District Court faithfully applied the public forum doctrine's classification scheme that this Court has articulated in such cases as *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), and *United States v. Grace*, 461 U.S. 171 (1983).[11]

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[11] As the District Court wrote in explaining its findings that Capitol Square was a quintessential or traditional public forum:

Several important constitutional principles flow from the identification of a site as a quintessential public forum. First, the government may not impose content-based restrictions on speech in a public forum absent a compelling state interest that cannot be more narrowly achieved. *E.g., Carey v. Brown*, 447 U.S. 455, 461 (1980). Second, the fact that a public forum is located near the seat of government does not diminish the constitutional protection afforded to speech; if anything, it enhances it. *See Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Third, the government does not endorse speech (religious or otherwise) merely by giving the speaker access to a public forum. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981) ("an open forum . . . does not confer any imprimatur of State approval on religious sects or practices"). *See also Lamb's Chapel v. Center Moriches Union Free School District*, ___ U.S. ___, 113 S. Ct. 2141 (1993), and *Board of Education of West Side Community Schools v. Mergens*, 496 U.S. 226 (1990).

The Supreme Court has defined three types of fora: "The traditional public forum, the public forum created by government designation, and the non-public forum." *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985). Traditional public fora are "those places which by long tradition or by government fiat have been devoted to assembly and debate." *Id.*

A18. In its related Opinion and Order of January 4, 1994, the District Court also referred to Capitol Square as an "archetypal public forum" "from time immemorial." RA6.

The State does not dispute these principles as much as it seeks to distinguish them. In particular, the State argues that private, unattended religious displays on public fora must be treated differently than other forms of speech because there is a greater risk that such speech will mistakenly be attributed to the government. Although the Establishment Clause prohibits the endorsement of religion, the risk that unattended religious displays will create a mistaken perception of endorsement must ultimately rest on factual findings. Based on the record here, both lower courts found that no such risk was present.

It is inconceivable that the State would be advancing the same argument of *per se* endorsement if this case concerned a series of cardboard boxes erected by a homeless group to protest the State's housing policies. *See Students Against Apartheid Coalition v. O'Neil*, 838 F.2d 735 (4th Cir. 1988). Indeed, unattended displays are not generally barred from Capitol Square. Yet, the State has never been able to explain why the risk of a mistaken perception of endorsement *automatically* exists for unattended religious displays when it does not exist for private unattended displays of other kinds. This creates an obvious dilemma for the State. On the one hand, if the risk of the mistaken perception of endorsement is no greater for religious displays than for other displays, the State's contention that endorsement must be presumed when a religious display is present is discriminatory. On the other hand, if some unattended religious displays do present some special risk of a mistaken perception of endorsement – albeit

one that the State cannot specify – then the State cannot justify its decision to grant favored treatment to the menorah in Capitol Square. *See, e.g., Larson v. Valente*, 456 U.S. 228 (1982).

Moreover, aside from issues of discrimination, the State's contention that the Establishment Clause requires a flat ban on unattended religious symbols contains an additional flaw. It erroneously presumes that reasonable onlookers will *automatically* believe that a controversial private symbol, like the Klan cross, is endorsed by the State. In the State's view, the presumption is so strong that no facts are sufficient to overcome the mistaken belief. This contention devalues the right of a speaker to display unattended religious symbols on a public forum, even when there is no evidence of an Establishment Clause violation. It also devalues the common sense of onlookers. Thus, in the State's view, religious speech is relegated to permanent second class status by the Establishment Clause of the First Amendment.

The Respondents do not quarrel with the endorsement test itself. Nor do the Respondents dispute the notion that, on a different set of facts, the government might be found guilty of violating the endorsement test by permitting a private religious display in a public forum. For example, Respondents readily concede that Establishment Clause problems would be presented if there were evidence that the government was intentionally giving preferential prominence to a religious display in a public forum.

Finally, Respondents have never contested the government's right to impose reasonable time, place and manner restrictions on all unattended displays in Capitol Square, assuming those restrictions are drafted and enforced in a content-neutral manner.

If the State truly believes that allowing the Klan cross might signal to the public that the State is violating the Establishment Clause by endorsing a religious symbol, the State may post signs to indicate the nature of the public forum, a statement of nonendorsement,[12] and of the State's obligation to protect freedom of expression. In *FCC v. League of Women Voters of California*, 468 U.S. 364, 395 (1984), this Court rejected a total ban on editorializing by public broadcasting stations and instead suggested the use of disclaimers to communicate the source of editorial positions. In *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court also suggested use of signs to disclaim sponsorship of messages delivered on shopping center premises. "Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law." *Id.* at 87.

However, State officials in this case chose to take no curative measures. They did not act to protect their legitimate interests through a set of content-

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[12] This would implement existing State law which specifically gives notice that the use of Capitol Square does not constitute State endorsement. Ohio Administrative Code Section 128-04-02.

neutral regulations applicable to all unattended displays. Instead, they singled out the Klan's display for disfavored treatment. Likewise, they did not deny the Klan's application because they were concerned about the appearance of special treatment. Just the opposite was true. The Klan cross received no special treatment when finally erected under court order and was unmistakably the communication of a group whose views were abhorred by government officials.

The history of the Establishment and Free Exercise Clauses amply demonstrates that the purpose of the clauses was to insure government neutrality regarding religion. LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE (1986); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION (1988) 174-194; James Madison, *Memorial and Remonstrance Against Religious Assessments*, reprinted in the Appendix to *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947). The record in this case makes it equally clear that the principle of neutrality was violated by the State.[13]

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[13] In a brief submitted only a few weeks ago in *Rosenberger v. The University of Virginia*, No. 94-329 (argued Mar. 1, 1995), three of the State of Ohio's *amici* concluded that the "historic evidence strongly suggests that both Jefferson and Madison approved of providing religious groups access to public facilities on a non-discriminatory basis but saw the principle of non-establishment as barring the expenditure of any funds for the resulting religious activity." *See Amicus* Brief of Americans United for Separation of Church and State, American Jewish Committee, and Anti-Defamation League, at 22. *See also* Philip B. Kurland,

Viewed in its proper historical context, therefore, this case is not about endorsement at all. It is about a classic act of political discrimination against an unpopular group. If the State's argument that the Establishment Clause flatly bans the Klan cross for all public fora is to be taken seriously, it is an invitation to dilute the public forum doctrine. Because of the important role that the public forum plays in American political and religious discourse, the State's invitation should be rejected.

The Origin of the Religion Clauses of the Constitution, 27 WM. & MARY L.REV. 839, 842 (1986). The case at bar, of course, does not involve the expenditure of government funds, but it does involve access to a traditional public forum.

CONCLUSION

For the foregoing reasons, the Respondents respectfully urge this Court to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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MENORAH WAS LOCATED
ON ELEVATED CONCRETE
SUPPORT PLATFORM
BEHIND THIS WALL
PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 104

PLAINTIFFS'
SUPPLEMENTAL
EXHIBIT 105

3a

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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capital Square Review and Advisory Board,
Ronald T. Keeler, Daniel Shellenbarger
and Senator Richard H. Finan

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr,
and Knights of the Ku Klux Klan,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

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ARGUMENT

I. RESPONDENTS IMPLICITLY CRITICIZE THE COURT BELOW AND MISAPPLY THE ENDORSEMENT TEST.

Apparently recognizing the infirmity of the Sixth Circuit's *per se* holding, Respondents' attempt to recast the decision below as something other than a *per se* rule by describing it as an individualized finding based only on the unique facts of this case. Resp. Br. 26-27. This position is remarkable for at least two reasons. First, Respondents, by advocating for a fact specific standard, depart from the analysis of the court below which clearly held that private speech in a public forum cannot violate the Establishment Clause. Second, Respondents now appear to fully embrace the endorsement test as the appropriate approach to resolving Establishment Clause cases, even though such a test, when fully analyzed, demonstrates that the Establishment Clause would be violated by allowing the cross as Respondents seek herein.

A. Fact Specific Inquiry

Simply saying that the court below applied a fact specific standard does not make it true. A plain reading of the lower court's opinion reveals the court applied a *per se* rule: "a private organization's unattended display of a religious symbol in a public forum does not violate the Establishment Clause." *Capitol Square Review and Advisory Board v. Pinette*, 30 F.3d 675, 679 (6th Cir. 1994), Appendix to the Petition for Writ of Certiorari ("App.") at A8. Respondents' implicit criticism of the lower court's holding is consistent with the position of Petitioners: the court below went too far in finding that the public forum doctrine trumps the Establishment Clause. As its concluding

thought, for example, the court below flatly asserts that "[i]n a public forum, the religious content of private speech is *absolutely irrelevant* for First Amendment purposes." *Id.*, 30 F.3d at 680, App. A12 (emphasis added). According to the Sixth Circuit, the Establishment Clause can never be implicated by private religious speech in a public forum.

The claim that the religious content of private speech is irrelevant contradicts the premise of the endorsement test itself. If governmental actions violative of the Establishment Clause take place on governmental property, not a public forum, the same governmental actions on government property which is a public forum would likewise violate the Establishment Clause. Similarly, if actions are perceived to be government endorsement which take place in a nonpublic forum (e.g., creche in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989)), then the same actions in a public forum would be violative of the Establishment Clause, if also perceived to be government endorsement. The issue, for endorsement test purposes, is whether the display conveys a message of government endorsement, not whether the display is on a public or nonpublic forum.

Respondents attempt to criticize Petitioners on the same ground that Petitioners have criticized the decision below. While denying that the Sixth Circuit adopted a *per se* rule, Respondents characterize Petitioners position as advocating a *per se* rule that finds an "automatic violation" of the Establishment Clause. Resp. Br. 26. Respondents confuse and mischaracterize the test used by Petitioners with the conclusion reached. Petitioners' position is that placing a cross in front of the Statehouse meets any of the tests adopted by this Court, including the endorsement test with its fact specific approach. The rule suggested by Petitioners is simply the conclusion reached when one examines the fact of an unattended purely religious symbol in front of the seat of

government. Petitioners' position takes into account the relevant facts, but in a way that does not force courts to engage in the "jurisprudence of minutiae." *County of Allegheny*, 492 U.S. at 674 (Kennedy, J., concurring in the judgment in part and dissenting in part). The fact is that the cross is this nation's most, if not the world's most, recognizable purely religious symbol. The fact is that the front grounds of the Ohio state capitol is where the government has erected its state supported unattended displays, both permanent (numerous statues and flags) and temporary (Christmas seasonal displays, United Way exhibit). The fact is that these grounds have no history of private unattended displays, only government sponsored unattended displays. With these facts, the risk of misperception as to the sponsor of the display is at its greatest degree. A court is presented, then, with the significant possibility that an observer will consider the display supported by the government, resulting in an inevitable clash with the Establishment Clause.

B. Formulation of the Endorsement Test

The Sixth Circuit held that "the Establishment Clause forbids only religious speech sponsored by the government, so 'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" *Pinette*, 30 F.3d at 679, App. A9 (quoting *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1993) (en banc)) (emphasis in original). The Establishment Clause, however, also forbids religious speech *perceived by the reasonable observer* to be sponsored by the government. Contrary to Respondents' contention, the Sixth Circuit did not take all the relevant facts into account because it did not adequately formulate the inquiry. Even Respondents concede that a reasonable observer can perceive government endorsement when the

religious speech is private and in a public forum. *See* Resp. Br. 43. ("[O]n a different set of facts, the government might be found guilty of violating the endorsement test by permitting a private religious display in a public forum.") In order to find that a reasonable observer would not perceive government endorsement under the circumstances of the instant case, however, Respondents posit an omniscient observer who is aware of all the surrounding facts and circumstances, including (a) that the Latin cross "was not part of any state approved display," (b) that the Latin cross as used by Respondents "is one of the most unpopular symbols in American History," (c) that the Latin cross "was accompanied by a sign explicitly characterizing it as a private display," and (d) that "Ohio officials did everything in their power to exclude [the Latin cross] from government property." Resp. Br. 30.

By presenting their argument from the perspective of an omniscient observer, however, Respondents' undercut their own position. Although Respondents claim to accept the endorsement test as the appropriate approach to resolving Establishment Clause cases, Resp. Br. 43, they have returned to the *per se* position of the Sixth Circuit by considering Establishment Clause questions from the perspective of the omniscient observer. Respondents' endorsement test, then, really is no test at all; government cannot endorse or appear to endorse religion if the observer knows for a fact that the religious display was private. Under Respondents' test, the creche in *County of Allegheny* would have been upheld because the all-knowing observer would know that the display was private and was only allowed by the government to express tolerance and celebrate plurality.

Respondents conclude that an Establishment Clause violation could be found "if there were evidence that the government was intentionally giving preferential prominence

to a religious display in a public forum." Resp. Br. 43. In essence, then, Respondents do not really articulate an endorsement test, but rather a proselytizing test because the only time Respondents would find an Establishment Clause violation is if the government placed its "weight behind an obvious effort to proselytize on behalf of a particular religion." *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part). The instant case would present a violation of the Establishment Clause even under the proselytizing test as discussed in Petitioners' initial brief.

Furthermore, Respondents' omniscient observer simply does not exist as a real person or as a useful construct of real world people. Respondents' position is an unrealistic legal fiction that does not take real world considerations into account. Any Establishment Clause test should be workable and realistic; Respondents' test is neither. For every constitutional scholar with an unbridled drive to seek out the truth about all displays on the Statehouse grounds, there are literally hundreds who drive by the Statehouse everyday giving displays only a quick glance, who have read only the sports page in the last month and prefer Hard Copy to CNN. Respondents' conclusion that there are only two groups of people, omniscient observers (those whom Respondents would call reasonable) and "hypothetical dolts" and "ignoramuses" whose views are not worthy of consideration for endorsement test analyses, is unrealistic. Most people live between those two extremes. There are reasonable people that do not know a "Klan cross" from a Methodist cross or that a "Klan cross" carries a message of rallying against tyranny derived from fourteenth century Scotland. There are reasonable people such as Respondents' own witness at trial who believed that the unattended United Way display at the Statehouse (a private display at a public forum) signaled government approval of United Way. JA 161.

Categorizing reasonable observers as those who know all the facts and any other observers as "hypothetical dolts" without evidentiary analysis to disprove that such a category, under the circumstances of this case, might include a majority of this country's citizens is to do away with the endorsement test altogether by relegating those who perceived the cross as approved by the government to be statistically insignificant and not reasonable.

One of Respondents' *amici* criticizes Petitioners for considering Establishment Clause issues from the perspective of an alleged "subjective observer." Br. *Amicus Curiae* Christian Legal Society 21-28. In contrast to the hyper-sophisticated observer perspective presented by Respondents and the court below, however, Petitioners offer this Court the objective perspective of just what an unattended purely religious symbol sitting by itself right in front of the seat of government would mean to a person of ordinary knowledge and intelligence. This reasonable observer can be properly analogized to the "reasonable man" who serves as the community standard in the common law of torts. As such, the reasonable observer constitutes a rather idealized version of the ordinary citizen, who has ordinary experience and knowledge. This reasonable observer would not be a "hypothetical dolt," nor an idealized all-knowing individual, but someone that accurately represents a cross-section of society.

The unworkability of Respondents' omniscient observer test is evident from the "facts" Respondents rely on. None of these facts even if true go to the "objective" meaning of the display, the sensible perspective of many of the observers viewing the display. As Justice O'Connor explained in *Lynch v. Donnelly*, 465 U.S. 668 (1984):

> The meaning of a statement to its audience depends both on the intention of the speaker and on the "objective" meaning of the statement in the community. Some listeners need not rely solely on the words themselves in discerning the speaker's intent: they can judge the intent by, for example, examining the context of the statement or asking questions to the speaker. Other listeners do not have or will not seek access to such evidence of intent. *They will rely instead on the words themselves; for them the message actually conveyed may be something not actually intended.* If the audience is large, as it always is when government "speaks" by word or deed, some portion of the audience will inevitably receive a message determined by the "objective" content of the statement, and some portion will inevitably receive the intended message. Examination of both the subjective and the objective components of the message communicated by a government action is therefore necessary to determine whether the action carries a forbidden meaning.

Id., 465 U.S. at 690 (O'Connor, J., concurring) (emphasis added). The message actually conveyed by the display, therefore, depends on viewing the display in and of itself and may differ from the intended message. Indeed, when the speech is in the form of an unattended display where no words are spoken and no body language conveyed, the speech *is* that which is perceived by the observer.

Respondents, thus, confuse the meaning of the Latin cross by attempting to substitute their subjective intent for the

objective perspective of the reasonable observer. Regardless of what message Respondents intended to convey with the display, the objective meaning of the display as a purely religious symbol standing alone would create the message of government endorsement. The messages Respondents wish to communicate, thus, cannot determine the Establishment Clause analysis.

While there may have been gatherings, rallies, and speeches on the Capital Square, unattended displays have been rare, and have all been government approved. It would not be evident from the objective perspective of the reasonable observer, therefore, that the Latin cross was not a government approved display. After all, it appears right in front of the Statehouse itself. Indeed, the unrebutted testimony in this case was that an actual well-informed observer called to offer testimony on behalf of Respondents was inclined to conclude that if the State of Ohio knowingly permitted an unattended display to remain upon the Capitol Square for any length of time, the presence of that display would lead that observer to infer that the government "was in support of the activity." JA 161.

Nor would the reasonable observer be expected to know that the plain, white Latin cross he was viewing was a "Klan cross." Without more information than that gleaned from objectively viewing the display, the reasonable observer would not consider the display an unpopular symbol at all, but in fact a symbol with a profoundly popular and purely religious meaning. To millions of Christians, the message of the Latin cross is that described by St. Paul in his first letter to the Corinthians: "For the message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God." 1 *Corinthians* 1:18, NIV. These members of the majority religion would be surprised to learn that their sacred symbol standing by itself

was "generally understood to express views of racial supremacy." Resp. Br. 30 n.9.

Furthermore, the explanatory sign was ineffective as a means of separating the government from the display's message to all but the most determined observers who (a) could see from their vantage point that there was a sign, (b) would tramp across the statehouse lawn, and (c) could read and understand the sign. This cannot be the objective perspective of the reasonable observer, many of whom would be driving by the display or viewing it from afar.

Finally, the reasonable observer, a composite that must include children and visitors alike, could not be expected to be aware of the government's opposition to the display. Many observers cannot or will not examine the context of the display, cannot ask questions of a speaker who is not present, and so will rely on simply viewing the display itself to interpret its message. *See Lynch,* 465 U.S. at 690 (O'Connor, J., concurring). Furthermore, according to Respondents, the act of government opposition was an element which raised the level of knowledge of an observer and therefore helped to separate Petitioners and the cross. Respondents' argument presents a "catch 22" to Petitioners. If Petitioners' opposition is a factor in whether a court will find an Establishment Clause violation, a private cross display would be found to violate the Establishment Clause if Petitioners permit it, but it would pass Establishment Clause scrutiny if Petitioners forbid it. This places Petitioners in an unacceptable dilemma; if Petitioners want the cross legally erected, they deny the application, but if they want it off government property, they approve the permit.

Respondents misconception of the reasonable observer is most evident from their discussion of the significance of

the menorah and the Latin cross. Resp. Br. 32-35. Respondents ignore pronouncements by members of the Court on the secular as well as religious meaning of the menorah. *See County of Allegheny*, 492 U.S. at 582-87 (Blackmun, J.; joined by O'Connor, J., and Stevens, J.); *id.* at 665 (Kennedy, J., concurring in judgment in part and dissenting in part; joined by Rehnquest, C.J., White, J., and Scalia, J.). It is disingenuous for Respondents to assert now, knowing the position of members of the Court and even stipulating to the very fact that the menorah has "secular significance," JA 98, that Petitioners "inappropriate[ly] insist[ ] on defining the menorah as a secular symbol." Resp. Br. 34.

Respondents' attempt to downplay Establishment Clause concerns only emphasizes the weakness of their position. The perception of the reasonable observer is shaped to a significant extent by the display itself. The message of the cross is not only a message unmistakably and purely religious, it is a message which proselytizes to the highest degree. It is a message which says that belief in the death and resurrection of Jesus Christ is necessary for eternal salvation. When placed on the grounds of the state government, the message is that the government encourages its citizens to seek salvation through Jesus Christ.

Respondents suggest, without support of evidence in the record, that reasonable observers would receive from their cross a meaning of liberty and other political concepts. This would be a surprise message to the millions of adherents who hear only St. Paul's words that salvation comes from Jesus' death on the cross to atone for the sins of mankind when viewing a simple Latin cross. It also would be a surprise to millions of nonadherents who hear the same proselytizing message. Surely Respondents do not want this Court to hold that the many adherents and nonadherents who

hear only the proselytizing message of St. Paul when they view the cross, and not the message which the Klan alleges it intended to convey, are "ignoramuses."

No matter how well informed a reasonable observer is expected to be, there are more reasonable people who understand the proselytizing message of the cross, and more reasonable people who know the power of government and the ownership of the front lawn of the capitol, than there are people who know that Respondents erected the cross and wished to communicate some kind of political meaning. To suggest that all reasonable viewers of the cross displayed in this case would receive a political message sent by the Klan rather than a salvation message endorsed by the government exceeds the evidence of this record and logical understanding of human nature.

Respondents further criticize Petitioners for treating religious speech differently then nonreligious speech. By doing so, Respondents again reveal a fundamental misunderstanding of the issue before this Court. Contrary to Respondents' mischaracterization of Petitioners' position, Petitioners' do not argue that "the risk of a mistaken perception of endorsement *automatically* exists for unattended religious displays when it does not exist for private unattended displays of other kinds." Resp. Br. 42 (emphasis in original). Indeed, Petitioners argue the converse; the risk of a mistaken perception of government endorsement always exists for any unattended display positioned right at the seat of government. The appearance of endorsement is always present, but it is immaterial unless the appearance is constitutionally impermissible. And it is only constitutionally impermissible when the display is religious. In other words, no Establishment Clause concern arises unless the display is religious. If Respondents deem this different treatment of religious speech as discriminatory, it is because the

constitution mandates governmental restraint from establishing a religion whereas government is not constitutionally restrained from supporting other private actions.

II. A DISCLAIMER WOULD NOT EFFECTIVELY PROTECT PETITIONERS' INTEREST IN AVOIDING AN ESTABLISHMENT CLAUSE VIOLATION.

Respondents further criticize Petitioners for not taking "curative measures" such as posting disclaimer signs to "protect their legitimate interests." Resp. Br. 44. As pointed out in section V of Petitioners' initial brief, however, a disclaimer would be ineffective and pose its own set of Establishment Clause problems. Furthermore, the authority Respondents cite to support the notion that a disclaimer would be effective is inapposite. In *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) and *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), the Court suggested that the use of disclaimers could clarify the sponsorship of the message, but in both cases the disclaimer was as perceptible as the message itself. Anyone receiving the message would at the same time receive the disclaimer in the same medium. In *FCC*, a station could broadcast the disclaimer every time it editorializes. 468 U.S. at 395. In *Robins*, a speaker or handbiller would be present to answer inquiries, and the owner of the shopping center could "post[ ] signs in the area where the speakers or handbillers stand." 447 U.S. at 87. Obviously, if every observer receiving the message communicated by the symbol of the Latin cross at the seat of government simultaneously received and understood the message in a disclaimer sign, the instant case would be analogous to *FCC* and *Robins*, and this Court could find the sign to be an effective means of negating the message of government endorsement.

The instant case, however, does not lend itself to the effective use of a disclaimer sign. Many observers, including those viewing the cross from afar or by driving by, would not even see the sign. Others, including the young, non-English speaking or illiterate, will not be able to understand the sign. These observers would rely on the objective perspective of the display without the benefit of the disclaimer's message, and would likely conclude that this display of the Latin cross right in front of the Ohio Statehouse represents government endorsement of Christianity.

III. RESPONDENTS' POLITICAL DISCRIMINATION CLAIM MISCHARACTERIZES THE SOLE LEGAL ISSUE WHICH PROVIDED THE BASIS FOR THE DECISIONS BELOW AND WHICH IS NOW BEFORE THIS COURT.

Just as they attempted in their Brief in Opposition to Certiorari, Respondents seek to recast this case as raising issues quite distinct from those expressly presented and considered in any of the proceedings below. Furthermore, Respondents recharacterize the sole issue presented to the Court in Petitioners' Petition For Writ of Certiorari and the sole issue on which the Court accepted this case. Respondents erroneously argue that this case should turn on issues of political discrimination and the Fourteenth Amendment when this did not provide the reasoning for any of the decisions below. These arguments, in fact, were dismissed by both the District Court and Court of Appeals as evidenced by their square holdings.

The District Court stated that the permit application came "from a private party to erect a *religious* symbol in

what is a traditional public forum. In light of these facts, it is difficult to conclude that permitting this display would constitute government endorsement of religion" in violation of the Establishment Clause. App. A24. (emphasis added). Similarly, the Court of Appeals expressly concluded that the same points were determinative: "Because Capitol Square is a public forum and the Klan's display of a Latin cross is private speech, a reasonable observer could not perceive the display at issue to be a government endorsement of religion. Therefore, we hold that the display does not violate the Establishment Clause and we affirm." App. A2. Furthermore, consistent with these holdings, the question presented for this Court's review in the petition for a writ of certiorari did not include an element of political discrimination. In light of the plain holdings below and the question presented to this Court, Respondents' efforts to recast this matter instead as a political discrimination case are simply unavailing and unpersuasive.[1]

Respondents' attempt to recast this case as one of discrimination requires a showing that Petitioners would have granted another group's application to erect a large, unattended Latin cross on Capitol Square. Respondents can make no such showing because no such evidence exists. The sole basis for Petitioners' refusal to allow the erection of the universally recognized symbol of Christianity directly in front of the Ohio Statehouse was their belief that to do so would violate the Establishment Clause. The December 3,

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[1] The sole passage in which any of the courts below even mentioned the Equal Protection Clause, in passing, was a quotation by the court below from this Court's decision in *Police Dep't of Chicago v. Moseley*, 408 U.S. 92 (1972), a labor-picketing case. That quotation, which appears in the court's peroration, did not provide the legal ground for decision in either the district court or the court of appeals.

1993, letter to Respondents denying their permit application specifically stated that the decision was made in a good faith attempt to comply with the dictates of the First Amendment to the United States Constitution. JA 47.

Respondents simply ignore the compelling interest that motivated Petitioners to deny Respondents' application. The unattended religious, distinctly sectarian symbol of Christianity displayed on Capitol Square constitutes a violation of the Establishment Clause regardless of the sponsor. The Court has expressly held that the avoidance of an Establishment Clause violation by the state may constitute a compelling governmental interest "justifying an abridgement of free speech otherwise protected by the First Amendment." *Lamb's Chapel v. Center Moriches School District*, ___ U.S. ___, 113 S. Ct. 2141, 2148 (1993) (citing *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)).

Respondents argue that Petitioners' denial of their application was an act of discrimination based upon Petitioners' desire to silence speech they found repugnant. Yet, this argument ignores the fact that Petitioners attempted to ban the Latin cross whose symbolic message is viewed favorably, not repugnantly, by millions of Americans. Moreover, Petitioners' denial of Respondents' application was not based upon any possible political meaning Respondents attribute to the Latin cross or upon Respondents' more general principles.[2] Rather, Petitioners denied Respondents' application because of the Latin cross' universal solitary message, salvation through Jesus Christ,

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[2] Interestingly, Respondents fail to mention that Petitioners in fact granted a permit application allowing Respondents to conduct a rally on Capitol Square on October 23, 1993. It was in the permitted rally, not the Latin cross, that Respondents' admittedly distasteful message was conveyed.

and the fact that display of this unattended symbol on Capitol Square sends this unmistakable message to the reasonable observer. Of all the elements of the general message of Respondents which might be perceived as repugnant to many of our nation, the cross is not one of them.

Furthermore, Respondents suggest that the display of a Latin cross by some other group may well violate the Establishment Clause whereas the display of their cross would not. This argument is inherently inconsistent; symbolic speech of the Latin cross remains identical regardless of its sponsor. As one *amici* supporting Respondents stated: "it is legally irrelevant to this case that the group displaying the cross is the Ku Klux Klan. The state officials do not claim power here to regulate speech that inflicts harms through racial, gender, or religious bigotry."[3] Petitioners have vigorously defended this position throughout these proceedings. For purposes of Establishment Clause analysis, the fact that Respondents here are the Ku Klux Klan is irrelevant and does not alter the constitutional inquiry.[4]

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[3] Br. *Amicus Curiae* Christian Legal Society 3. Moreover, this position squarely contradicts Respondents' political discrimination claim as it properly characterizes the correct factual and legal framework upon which Petitioners based their denial of Respondents' application and which formed the basis of the lower courts' holdings.

[4] The Court can readily imagine that, if Petitioners had allowed a church to put up a cross, another group would have brought an Establishment Clause challenge. Thus, if allowing a church to erect a cross was a violation of the Establishment Clause, the Court could not fashion a remedy for Respondents by requiring Petitioners to be involved in the same violation; the Court would first have to determine the permissibility of any private group to display a purely religious symbol at the seat of government.

Respondents' attempt to downplay the powerfully religious significance of the Latin cross is in stark contrast to the express testimony given by Respondents. In questioning by counsel for Petitioners, Respondent Carr testified that the symbol Respondents wished to erect was in fact a large Latin cross, Tr. of Dec. 20, 1993, Hearing p. 60, and that the cross is indeed a sacred symbol.[5] JA 142. In fact, Respondents' own uncontroverted testimony of their purpose in seeking to erect the Latin cross as "a symbol for our Lord, Jesus Christ", JA 173-175, in furtherance of their more general purpose to "establish a Christian government in America." JA 144-147. The irony in Respondents' contention that Petitioners have somehow singled them out for alleged discriminatory behavior is the undisputed fact that Respondents were the first group to utilize the Statehouse grounds to erect an unattended purely religious display such as the cross. Petitioners either had to accede to Respondents' admitted attempt to proselytize on behalf of Christianity in order to avoid a political discrimination case or Petitioners had to reject the cross on the basis of the Establishment Clause and face this very claim of political discrimination.

Respondents' argue that their equal protection claim is validated because Petitioners have allowed a menorah to be displayed in front of the Ohio Statehouse for several years in

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[5] *See also* Br. *Amicus Curiae* Liberty Counsel at App. A1 n. 3, stating that the Latin Cross "is appropriate the world over, and may be used by any religious body whose doctrines, include a confession of the Lord Jesus Christ and His atoning death." Importantly, all five *amici* briefs filed on behalf of Respondents are those of religious organizations. Apparently, these *amici* do not downplay the religious significance of the Latin cross as Respondents attempt. Nor did the ministers who in response to the cross at issue sought to display their own crosses to reflect their understanding of the cross' religious message.

conjunction with a Christmas tree as part of a holiday seasonal display. This contention completely ignores the fact that the Court's square holding in *County of Allegheny* compels the State of Ohio to permit the display of a menorah in this setting, in part because the menorah has both religious and secular significance when it is displayed contemporaneously with the Christmas Tree as part of the Christmas and Chanukah holiday season.[6] *See, e.g.*, 492 U.S. at 618 n. 68; *See also id.* at 665 (Kennedy, J., concurring and dissenting in part). In fact, several Justices in *County of Allegheny* expressed grave doubts about the propriety of any religious display of a cross -- which is not so associated with the holiday season -- in the very same setting. See *id.*, 492 U.S. at 629-30 (O'Connor, J., concurring); *id.*, 492 U.S. at 661 (Kennedy, J., concurring in judgment in part and dissenting in part).

Furthermore, Respondents persistently refer to matters litigated in the hearing conducted on January 3, 1994, which dealt solely with whether to allow Respondents to conduct a rally on January 15, 1994. The Order which provided the sole issue for review by the Court of Appeals and by this Court was rendered on December 21, 1993 and required Petitioners to allow Respondents to erect a Latin cross on Capitol Square during the Christmas holiday season. It is obvious that no portion of the record from the January 3, 1994, hearing was relied upon by the District Court in its

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[6] Petitioners also were obligated to allow the menorah to be erected under the prevailing Sixth Circuit precedent at the time. *See Americans United* (holding that a privately funded menorah erected during the Chanukah season in a public forum did not violate the Establishment Clause).

ruling as the Court's Order was issued December 21, 1993.[7] Thus Respondents' references to matters litigated at the January 3, 1994, hearing are irrelevant. This is further evidenced by discourse between counsel for Petitioners and District Court Judge James L. Graham during the December 20, 1993, hearing when the District Court explicitly recognized that matters dealing with the State's denial of Respondents' request to conduct a rally on Capitol Square on January 15, 1994, were not relevant to their request to erect the Latin cross:

> Mr. Cordray: . . . as you have seen from our brief, our argument here, and our argument to Mr. Keller when he came to us for advice on denial of the permit or granting of the permit, was that we could not embroil ourselves in a violation of the establishment clause, and whether there is --
>
> The Court: So the state isn't saying that it's denied the permit to erect this cross during the Christmas season because the Klan had a demonstration in November and there was a disturbance or that the Klan had a demonstration in November and we sent them a bill for the cost of it and they didn't pay it. Neither of those are asserted as grounds for the denial of the permit to erect the cross, is that correct?
>
> Mr. Cordray: That is correct, Your Honor....

---

[7] Petitioners did not appeal the Order rendered by the District Court on January 4, 1994, relating solely to the rally issue.

Tr. of Dec. 20, 1993, Hearing p. 18-19.

Petitioners provided but one legal reason for denying Respondents' request to erect a large unattended Latin cross directly in front of the Ohio Statehouse: a wish not to violate the Establishment Clause. That is the issue before this Court, despite Respondents best efforts to avoid it.

CONCLUSION

For the foregoing reasons and the reasons stated in Petitioners' initial brief, this Court should reverse the decision of the United States Court of Appeals for the Sixth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

—v.—

VINCENT J. PINETTE, DONNIE A. CARR, and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND THE ANTI-DEFAMATION LEAGUE IN SUPPORT OF PETITIONERS

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INTERESTS OF THE *AMICI*

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, political, religious and economic rights of Jews. It has filed numerous briefs *amicus curiae* in cases involving the Establishment Clause. In recent years it has on many occasions addressed the public display of religious symbols and the relationship between the Establishment Clause and the public forum doctrine.

* * *

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, and to combat racial and religious prejudices in the United States. ADL has always adhered to the principle that these goals and indeed the general stability of our democracy are best served through the separation of church and state and the preservation of the fundamental right to free exercise of religion.

In support of these principles, ADL has previously filed briefs before this Court in such cases as *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), *Board of Trustees v. McCreary*, 471 U.S. 83 (1985), and *Lynch v. Donnelly*, 465 U.S. 668 (1984). As a result of its longstanding commitment to the principles set forth above, ADL is able to bring to the issues raised in this appeal the perspective of a national organization dedicated to safeguarding the religious freedoms of all Americans. ADL submits this brief because it believes this case raises serious questions regarding government endorsement of religion in contravention of the Establishment Clause of the First Amendment.

* * *

The brief is filed with the consent of the parties.

SUMMARY OF ARGUMENT

A. If the cross is permitted to stand unattended on the Capitol Square, closely facing the edifice that is the seat of government, the scene will invite observers to believe that the State endorses the message conveyed by the religious symbol. The case does not differ in principle from *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 600 (1989), where the Court forbade the placement of a crèche in a county seat of government, finding that in permitting that arrangement "the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message." This case is *a fortiori*; the Court is not itself asked to prohibit the display but only to rule that the State is empowered to prevent such a use of its Capitol Square and Statehouse as a means of avoiding a clash with the Establishment Clause.

The mute power of symbols, and the emotions they evoke, is a matter of familiar experience. Against the demand to join the religious symbol with the public square, the State of Ohio is entitled to act upon the constitutional judgment that "the symbolic union of church and state . . . is . . . likely to be perceived by adherents of the controlling denomination[ ] as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Grand Rapids Sch. District v. Ball*, 473 U.S. 373, 390 (1985). These perceptions correspond precisely to the reasons why the Klansmen demand, and others, along with the State, oppose the setting of the public square for the cross. In the case of the Klan, the tension is specially heightened given that organization's history of militant, not seldom violent, nativist hostility to minority religions as well as unsympathetic Protestant denominations.

The complex picture before the Court presents a diversity of concerns, sometimes superficially contradictory but all pointing in the

end to the soundness of Ohio's judgment disallowing the cross on Capitol Square. That the cross is the symbol of the majority religion evokes a reminder of the special role of the Religion Clauses as protectors of minorities. At the same time, the recent stream of cases involving menorahs recalls that Jews, like Christians, divide sharply over the suitability of having *their* religious symbols favored by a public site as against the constitutional barrier that forbids intermingling religious power with the power of secular government. The opponents of the joinder, whatever their religious faiths, are on the solid ground of the Establishment Clause.

B. The particular character and force of religious messages that would be steadily conveyed and supported by symbols standing alone on the public square comprise a compelling state interest in avoiding a violation of the Establishment Clause. The message of the symbol, though it is protected expression, differs vitally from a live speaker. The speaker speaks for himself or herself. The religious symbol, planted alone on the government's site, carries the clear impression that it would not be there but for the favor or approval of the government "owner." This message is not altered simply because the square has been host to a wide variety of speakers. A substantial percentage of the audience viewing the symbol will be unfamiliar with this history and the legal niceties of Free Speech doctrine. The Establishment Clause protects against unintended appearances of endorsement as well as the kind of purposeful support for religion found in *Stone v. Graham*, 449 U.S. 39 (1980). This case should be resolved in favor of the State's judgment to disallow placement of the religious symbol on the public square.

ARGUMENT

THE STATE COULD PROPERLY FIND THAT AN UNATTENDED RELIGIOUS SYMBOL ON THE STATE'S CAPITOL SQUARE, AT THE SEAT OF GOVERNMENT, WOULD BESPEAK ENDORSEMENT OF THE SYMBOLIZED RELIGION AND VIOLATE THE ESTABLISHMENT CLAUSE

A.

The Symbol on the Public Square Implies Public Favor or Endorsement

What Justice Holmes said of a word is no less true of a non-verbal symbol: it "may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918). Unlike a live speaker, an unattended symbol placed on the public land, especially where it is at the seat of government, and standing there expressing its mute message steadily for days or weeks on end, gives rise to a likely, if not an inevitable, inference that the message is one viewed with favor by the state authority on whose land the symbol stands. Judicial and other observers over the years have given repeated testimony to the likelihood and the reasonableness of this inference.

The Supreme Court of Oregon made the point 25 years ago:

> The employment of publicly owned and publicly maintained property for a highly visible display of the character of the cross in this case necessarily permits an inference of official endorsement of the general religious beliefs which underlie that symbol.

Lowe v. City of Eugene, 463 P.2d 360, 363 (1969), *cert. denied*, 397 U.S. 1042 (1970).[1] It is not necessary, of course, for the state to argue that the inference must "necessarily" be permitted, as the Oregon court indicated; it is sufficient, as we will emphasize again, that a "reasonable observer" might draw the inference, or, indeed, that *some portion* of the reasonable observers in the community might so infer.

In circumstances that vary only with respect to essentially unimportant details, the point has been made repeatedly in opinions of this Court and other courts. In *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 599-600 (1989), speaking of a crèche that had been placed in a building that was "the seat of county government," this Court said:

> No viewer could reasonably think that it occupies this location without the support and approval of the government. Thus, by permitting the "display of the crèche in this particular physical setting," the county sends an unmistakable message that it supports and promotes the Christian praise to God that is the crèche's religious message.

(Citation and footnote omitted.)

In 1983, in a case that led to an equal division in this Court, District Judge Stewart spoke of the message conveyed by a crèche placed on a public circle which was not, as in this case, the seat of government:

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[1] Some years later, the cross having been approved by city voters as an American Legion-sponsored "Veterans War Memorial Cross," the Oregon Court (4-3) allowed its maintenance on city property along with an explanatory plaque. *Eugene Sand & Gravel, Inc. v. City of Eugene*, 558 P.2d 338 (1976), *cert. denied*, 434 U.S. 876 (1977).

> [W]hen a symbol is implanted on public land that land uniquely becomes the message bearer, and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

McCreary v. Stone, 575 F. Supp. 1112, 1131 (S.D.N.Y. 1983), *rev'd*, 739 F.2d 716 (2d Cir. 1984), *aff'd by an equally divided Court sub nom. Board of Trustees v. McCreary*, 471 U.S. 83 (1985).

Similarly, following this Court's lead in *Allegheny*, the Fourth Circuit ruled as follows with respect to a crèche situated on the front lawn of a county office building:

> Absent any contrary indication, the unmistakable message conveyed is one of government endorsement of religion - impermissible under the Establishment Clause of the Constitution.

Smith v. County of Albemarle, 895 F.2d 953, 958 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990).

Whatever may be true of a park or a street distant from the seat of government, the inference of government endorsement is strong and powerfully reasonable when the religious symbol is emplaced in the public square immediately fronting the seat of government. Where, as here, the proposed identification of the site with the government authority is not debatable, there is a compelling case that the state is empowered, if not bound, to avoid the appearance of government favoritism for (or opposition to) a religion. The Second Circuit, undertaking to follow and implement this Court's teachings in the *Allegheny* case, has reflected the sound position that the sensitive interests protected by the Establishment Clause are not to be risked or measured by geographic subtleties putting borders around the impact of apparent government endorsement.

> [E]very square foot of the Park is linked to the seat of municipal government, and any attempt to carve the Park into areas that do or do not have a direct view of City Hall is therefore meaningless for purposes of the Establishment Clause.

Chabad-Lubavitch of Vermont v. City of Burlington, 936 F.2d 109, 112 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992). In any event, refined distinctions could have no place in the circumstances of the present case. The cross in question was intended to stand, and ordered by the lower courts to stand, directly confronting the broad facade of the Ohio Statehouse (J.A. 62, 63, 97).

This case may be less patently compelling perhaps than the situation in *American Jewish Congress v. City of Chicago*, 827 F.2d 120 (7th Cir. 1987), which concerned a crèche placed inside the City Hall. There, the court said:

> Because City Hall is so plainly under government ownership and control, every display and activity in the building is implicitly marked with the stamp of government approval. The presence of a nativity scene in the lobby, therefore, inevitably creates a clear and strong impression that the local government tacitly endorses Christianity.

Id. at 128. While giving "house room" to the religious symbol is perhaps the clearest case, the clash with the Establishment Clause remains plain enough, it is submitted, when the government allows the symbol to be placed on its front lawn. That is precisely the case of *Albemarle*, 895 F.2d at 958, where the court found the Establishment Clause to *forbid* (not merely permit officials to disallow) a crèche "situated on the front lawn of the County Office Building . . . ." This is also the case now before the Court. For both proponents and opponents of the Klan's cross, the issue is the appearance of association with the power and prestige of government,

and the resulting benefit to the religious display and the sentiments the display symbolizes.

The critical question in every case is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985).

The so-called disclaimer attached to the cross in the Capitol Square is a trivial detail that should have no measurable impact on the issues in the case.[2] The paper itself seems to flap in the breeze and to curl up so that it is only partially legible at any given time (J.A. 62, 63). Beyond that, the statement that the cross "was erected by private individuals without government support" (J.A. 100) does not distinguish it from other privately financed structures and symbols to be found in public places and parks around the Nation where, characteristically, people are led to find the association with the public land a mark of approval by the government for the subject or person memorialized. Both those who love and those who hate particular symbols in public places, without regard to the special question of religion, focus on the association between the public owner of the land and the idea or thing symbolized. No matter who pays for it, the Confederate flag flown from a state building in the South wins the approval of some and the hostility of others, depending on the ideas and the history symbolized. *See, e.g., NAACP v. Hunt*, 891 F.2d 1555 (11th Cir. 1990) (constitutional challenge to Confederate flag flown above Alabama state capitol); *Holmes v. Wallace*, 407 F. Supp. 493 (M.D. Ala.), *aff'd mem.*, 540 F.2d 1083 (5th Cir. 1976) (same); *Smith v. St. Tammany Parish Sch.*

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[2] In *Stone v. Graham*, 449 U.S. 39 (1980), this Court held unconstitutional the posting of copies of the Ten Commandments on the walls of public classrooms even though the copies were purchased with private contributions.

Bd., 316 F. Supp. 1174 (E.D.La. 1970) (ordering removal of Confederate battle flags from local school system); *aff'd*, 448 F.2d 414 (5th Cir. 1971). *See also* Tony Horwitz, *Rebel-Flag Battle Opens Old Wounds, Builds New Alliances*, Wall St. J., Feb. 10, 1995, at A1.

Other circuits, like the court below and the Eleventh Circuit in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (en banc), have disagreed with the inference perceived by the Second, Fourth, and Seventh Circuits. The issue thus presented is not a species of factual contest among judges to see which come closest to representing the "reasonable observer" in whose judgment the question is to be tested. The problem is, rather, at most a mixed question of law and fact, where the judgment of constitutional law ultimately is for the courts, and in the end this Court, to resolve. *Lynch v. Donnelly*, 465 U.S. 668, 693-94 (1984) (O'Connor, J., concurring) ("[W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. Although evidentiary submissions may help answer it, the question is, like the question whether racial or sex-based classifications communicate an invidious message, in large part a legal question to be answered on the basis of judicial interpretation of social facts.").

The solution lies in an analysis of the interests at stake, both of those seeking the use of the public square and of those resisting, in light of the familiar, though sometimes difficult, principles of the Establishment Clause. It is pertinent to begin with the sponsors of the Klan cross and *their* motivations in desiring the Capitol Square as the situs of that display. Granted that the site is a prominent one, there is little or no doubt that a prime motivation for seeking that place for the planting of the cross is its close association with government and the power of government.[3] Like Justice Holmes and

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[3] The common expression referring to the speaker who "wraps himself in the flag" makes in a homely way the point that ought to run through the consideration (continued...)

the courts in repeated instances, these sponsors surely recognize that their symbol takes color, including the color of authority, from being associated closely with government by its placement. *Spence v. Washington*, 418 U.S. 405, 410 (1974) ("the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol").

There is then the concern of those who oppose the siting of the cross on Capitol Square. These include, surely, members of religions other than Christianity or of no religion at all who see in the cross both the most fundamental symbol of Christian inclusion and the corresponding symbol of non-Christian exclusion. *See County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 626 (1989) (O'Connor, J., concurring in part and concurring in the judgment) (crèche in courthouse "conveys a message to nonadherents of Christianity that they are not full members of the political community, and a corresponding message to Christians that they are favored members of the political community"); *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 128 n.3 (7th Cir. 1987) (citing testimony of Jewish plaintiff who stated that message he perceived from crèche display was that "'as a non-Christian I am an outsider in the political community who is merely tolerated,'" and "'[e]very time I see the crèche prominently displayed in City Hall, I feel personally diminished by its presence'"). Also included among the opponents are Christian proponents of the Establishment Clause, strongly construed, who see the association of Church and State as inimical to the interests of everyone, whether Christian or not. *See, e.g., Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc); *Smith v.*

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[3](...continued)
of this entire problem. Whether "wrapped in" or merely resting upon the symbol or place that reflects the state owner's authority, the association is meant to achieve the kind of benefit that religion is forbidden to have from government under the mandate of the Establishment Clause.

County of Albemarle, 895 F.2d 953, 954 (4th Cir.) (plaintiffs include six Christian or Unitarian ministers), *cert. denied*, 498 U.S. 823 (1990); *Kaplan v. City of Burlington*, 891 F.2d 1024, 1025 (2d Cir. 1989) (including minister plaintiff), *cert. denied*, 496 U.S. 926 (1990).

What emerges from this clash is that both proponents and opponents associate the symbol with its geographic placement, deriving either comfort or dismay from the support of the religious symbol by the governmental site.

In considering the opposed positions, it is fair and pertinent to note that in the present case, as in most cases of this kind, the Court's concern is with the majority religion and the protests come from members of minority religions or none at all. This is a matter of some significance, though by no means decisive, when we keep in mind that the essential office of the First Amendment Religion Clauses has been generally to protect the interests of minorities against majority desires and sentiments.

To be sure, this majority-minority analysis is limited. In recent years at least, a number of the cases have involved efforts to place, or the placement of, menorahs in public places. *See, e.g.*, *Allegheny*, 492 U.S. at 573; *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383; *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993); *Americans United*, 980 F.2d at 1538; *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992); *Kaplan*, 891 F.2d at 1025; *Lubavitch of Iowa, Inc. v. Walters*, 684 F. Supp. 610 (S.D. Iowa 1988), *aff'd*, 873 F.2d 1161 (8th Cir. 1989). The menorah sponsors have among their opponents Jewish organizations that see the intermingling of religion and government as a threat to the interests protected by the First Amendment. Thus, Jewish organizations appear with some frequency in opposition to the placing of menorahs in public places. *See, e.g.*, *Allegheny*, 492 U.S. at 651 & n.9 ("In this very suit, members of the Jewish faith firmly

opposed the use to which the menorah was put . . . ."); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d at 1163-64 (discussing views in opposition to menorah display expressed by amicus curiae Jewish Community Relations Council and American Jewish Congress); *Lubavitch of Iowa*, 684 F. Supp. at 615 n.5 (opposition of various Jewish groups to display of menorah on Capitol grounds).

The complexities of these divergent and varying interests underscore the difficulty of the problem. In the end, however, even these internecine disputes tend to buttress the position of those opposing religious symbols in public places, especially at the seat of government. The quarrels exemplify the bitterness of the conflicts that arise over attempts to associate or intermingle government and religion. More specifically, they add to the showing of compelling interest that prompts authorities like the government of Ohio to deny a public site for a religious symbol in order to avoid a collision with the Establishment Clause.[4]

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[4] *See Allegheny*, 492 U.S. at 650-51 (Stevens, J., joined by Brennan and Marshall, JJ., concurring in part and dissenting in part):

> [T]he Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful. Some devout Christians believe that the creche should be placed only in reverential settings, such as a church or perhaps a private home; they do not countenance its use as an aid to commercialization of Christ's birthday. Cf. *Lynch*, 465 U.S., at 726-727 (Blackmun, J., dissenting). In this very suit, members of the Jewish faith firmly opposed the use to which the menorah was put by the particular sect that sponsored the display at Pittsburgh's City-County Building. Even though "[p]assersby who disagree with the message conveyed by these displays are free to ignore them, or even turn their backs," see *post*, at 664 (Kennedy, J., concurring in judgment in part and dissenting in part), displays of this kind inevitably have a greater

(continued...)

This case may in some sense seem peculiar in that the proponent of the cross is the Ku Klux Klan, a group that is hardly a part of the contemporary "establishment" or likely at first blush to represent a danger of apparent collaboration between religion and government. Upon further reflection, however, this superficial appearance is seen to be deceptive. The primary concern is with the cross, a symbol of Christianity, not merely the Ku Klux Klan, which chooses to exploit it. Moreover, the history is by no means ancient of times when the Ku Klux Klan, notably in Ohio, could claim almost 400,000 members and "it seemed that the mask and hood had become the official symbol of the Buckeye state." David M. Chalmers, *Hooded Americanism* 175 (1987). For Blacks, Jews, and other Klan targets, the association of the Klan's cross with government is a source of specially heightened concern. The familiar history is of a "hydra-headed monster that espoused white supremacy, anti-Catholicism, anti-Semitism, fraternalism, nativism, and a return to moral order." William D. Jenkins, *Steel Valley Klan: The Ku Klux Klan in Ohio's Mahoning Valley* 159 (1990). As a central corollary, in Ohio among other states, with a background of violence and threatened violence, there has been a militant strain of Klan-style Protestant morality, pitted against other religions, including differing Protestants. *Id.* at 160-61, 163, 164-65.

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[4](...continued)
tendency to emphasize sincere and deeply felt differences among individuals than to achieve an ecumenical goal. The Establishment Clause does not allow the public bodies to foment such disagreement.

(Footnotes omitted.)

B.

Though Symbols Are Protected as "Speech," Their Impersonal Force on The Public Square Creates a Special and Compelling Interest in Avoiding Establishment Clause Violations

Along with the courts below, we assume without doubt that had the respondent Klan's members wished, with the cross at their side, to conduct a rally, deliver speeches, distribute leaflets, or otherwise participate personally in expressive conduct, the Establishment Clause would not stand in their way. Indeed, the record reflects that the Klan has been allowed to demonstrate on Capitol Square (J.A. 34-5).

As we have shown above, however, there is a crucial difference between speech by live speakers and religious symbols emplaced with no attendant speakers on the public square. Unlike the expressions of speakers, the display of an "unattended, solitary semi-permanent symbol" on the public square "in the absence of a live speaker to whom responsibility could be attributed," causes the governmental owner of the site to be "perceived as fulfilling the role of sponsor." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). That appearance of governmental sponsorship is a matter of decisive consequence in enforcing the protections of the Establishment Clause.

The power of symbols is a familiar subject of law and literature. *See* F.W. Dillistone, *The Power of Symbols in Religion and Culture* 2-15, 99-147 (1986). Moreover, the force of the religious symbol serves both to unite and divide. For Christians the cross symbolizes "the crucifixion and death of Jesus at Calvary", and is "linked to the mystery of creation as well as to the mystery of redemption . . . ." 4 Encyclopedia of Religion, *Cross*, 163 (Mircea Eliade ed. in chief, 1987). It also symbolizes "the end of Judaism." *Id.* at 163. Conveyed by a symbol, these stark messages are capable of arousing passions more potently emotional than comparable thoughts conveyed by words. Touching this reality, this Court has spoken of an

important symbol as "a short cut from mind to mind." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 632 (1943).

Given the powerful and potentially inflammatory impact of religious symbols, the State is entitled, even if it is not required, to take measures against the appearance of endorsing one religion or another in involvement with the passionate issues generated by differing religious beliefs. The private right to exhibit religious symbols must be safeguarded in accordance with the Free Speech as well as the Free Exercise Clause. The corollary protection against the threat of a religiously partisan government justifies equally the State's careful disassociation from such symbols of any faith.

This conclusion is not weakened by the history of speech-making and other forms of expression on the Capitol Square. The Establishment Clause is violated if "irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). The fact that the Capitol Square has been the site of past demonstrations or speeches will not dilute the appearance of state endorsement to the great number of people who are not intimately familiar with its past history or the legal niceties of First Amendment free speech doctrine. This observer may be "a passer-through or a passer-by." *Americans United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc) (Lively, J., dissenting). This observer will or may "draw his or her conclusions from the vista presented *at the time*." *Id.* (emphasis in original). Seeing the stark juxtaposition of the cross on the public square and the Capitol, such observers "do not have or will not seek access to . . . evidence of intent" but "will rely instead on the [symbols] themselves . . . ." *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). The result will be the very effect sought by the Klan and others from the brigading of the religious message with the authority of government through the placement of the unattended symbols at the seat of government.

The state's power to bar this result is not inconsistent with the Court's recent "equal access" decisions. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 113 S. Ct. 2141 (1993); *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v Vincent*, 454 U.S. 263 (1981). These cases all involved religious discussions, discourse, and speakers, with live and identifiable people as the messengers. None of them involved unattended symbols. Not a word in *Widmar*, *Mergens*, or *Lamb's Chapel* suggests that religious groups would have a right to place in the school's meeting facilities a plaque containing the Ten Commandments, *cf. Stone v. Graham*, 449 U.S. 39 (1980), a Nativity scene, a Buddhist wheel, a menorah, a crucifix, or any other kind of religious sign or symbol.

It seems apparent, in sum, that the question in this case, still open here, is essentially the question that led to the equal division in *Board of Trustees v. McCreary*, 471 U.S. 83 (1985). These amici submit that the question should be resolved in favor of the State's power to deny the appearance of endorsing one religion, or all religions, by disallowing unattended religious symbols to reside on the Capitol Square.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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In The

Supreme Court Of The United States

October Term, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

BRIEF *AMICUS CURIAE* OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN JEWISH COMMITTEE, PEOPLE FOR THE AMERICAN WAY, THE UNION OF AMERICAN HEBREW CONGREGATIONS, AND AMERICAN CIVIL LIBERTIES FOUNDATION OF VERMONT, INC., IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*

The interest of each *amicus curiae* is set forth in the appendix hereto. The letters from the parties consenting to the filing of this brief are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

The Court should apply the "no endorsement of religion" test in this case and not some other standard of review. The endorsement test, with its prohibition on government imprimatur of religion, represents the most appropriate analytical standard for reviewing the constitutionality of private speech in public areas. The no-endorsement principle is thoroughly consistent with our constitutional heritage and has been a recurring theme in church-state jurisprudence.

The court of appeals' holding below represents a rigid, *per se* rule that government endorsement of religion can never occur in a public forum so long as private speech is involved. This holding is inconsistent with the Court's public forum analysis which allows the state to show a narrowly tailored compelling interest in order to restrict protected speech. The holding also conflicts with the endorsement test, which requires courts to examine the entire context of the display to see whether endorsement has occurred.

Considering the entire context of the display of the Klan cross at Capitol Square, the Court should hold that the state would create the appearance of endorsing the religious message of the cross by allowing its display. The cross stands unattended and unaccompanied by any neutralizing symbols at a highly significant location closely associated with state

government. A reasonable observer would perceive that the cross occupies this special location with the support and approval of the government. Finally, the long-term display of the cross at this location invites religious divisiveness, a persistent concern of the Establishment Clause.

Each of the *amici* on this brief vigorously supports free exercise of religion for people of all faiths and has so advocated in numerous cases before this Court. Each knows too, however, that there is no religious need to place sacred symbols of any faith in public areas. There is abundant private property available for the public display of sacred symbols of all faiths - churches, synagogues, mosques, religious schools, store fronts, private homes and lawns.

When any group demands as a matter of right to place its sacred symbol in a public area, it does so because it seeks to send a message and to make a symbolic statement, i.e., unless display of this sacred symbol is permitted in a public area, it is not *official* enough. That is precisely our constitutional point. Sacred symbols of any faith do not need, and should not receive, official endorsement, express or implied.

As such, the question here is whether in certain situations, the Establishment Clause can serve as a bar to private speech in a public forum. The issue of whether the state may distinguish between types of religious symbols the menorah and the cross - is not in doubt. Government may not prefer one religion over another; nor may it define one religion's symbol as cultural or seasonal in order to provide it with special access. *Amici* contend that the display of the menorah and the cross under the circumstances of this case are equally unconstitutional.

ARGUMENT

I. THE "NO ENDORSEMENT OF RELIGION" TEST IS THE APPROPRIATE STANDARD FOR REVIEWING THE CONSTITUTIONALITY OF RELIGIOUS DISPLAYS IN PUBLIC FORA.

A. The "No Endorsement of Religion" Test Is Appropriate for Considering Issues of Religious Speech in Public Areas.

The Court should apply the "no endorsement of religion" test for reviewing the constitutionality of private religious speech in public areas. The test, with its prohibition on governmental imprimatur of religion, reflects "the essential command of the Establishment Clause, namely, that government must not make a person's religious beliefs relevant to his or her standing in the political community by conveying a message 'that religion or a particular religious belief is favored or preferred.'" *County of Allegheny v. ACLU*, 492 U.S. 573, 627 (1989) (O'Connor, J., concurring in part and in the judgment) (*quoting Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment)). No other analytical standard so closely captures that crucial aspect of nonestablishment that prohibits government from aligning its practices and policies with religion, from affirmatively favoring, disfavoring, or promoting one religion or religion in general, or from unintentionally "convey[ing] a message that religion or a particular religious belief is favored or preferred." *Wallace*, 472 U.S. at 70 (O'Connor, J., concurring).

The endorsement test is the most appropriate standard for reviewing issues of religious symbolic speech in public areas. The endorsement test had its first articulation and its

clearest application in the Court's two religious display cases. *Allegheny*, 492 U.S. at 592-94; *Lynch v. Donnelly*, 465 U.S. 668, 690-91 (1984) (O'Connor, J., concurring). As Justice O'Connor observed recently, while different categories of Establishment Clause cases may call for separate analytical approaches, those cases concerning government involvement with religious speech "require an analysis focusing on whether the speech endorses or disapproves of religion, rather than on whether the government action is neutral with regard to religion." *Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2499-500 (1994) (O'Connor, J., concurring in part and in the judgment). This authority instructs its use here. *Allegheny*, 492 U.S. at 592-94 ("In recent years, we have paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of endorsing religion...."); *accord Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141, 2148 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226, 247-48 (1990).

More than precedent calls for the application of the endorsement test in this case. Because messages communicated through symbols can be powerful, but at the same time imprecise, the potential for official endorsement arises whenever free-standing religious symbols are erected on public areas closely associated with government.[1] Unlike other analytical standards, the endorsement test seeks to address "the myriad subtle ways in which Establishment Clause values can be eroded" that are often difficult to

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[1] According to one commentator, people "are notably more sensitive to images than to ideas, more responsive to stereotypes than to logic, to the concrete symbol than to the abstraction." Max Lerner, *Constitution and Court as Symbols*, 46 Yale L.J. 1290, 1293 (1937).

articulate but are nevertheless real to religious nonadherents. *Allegheny,* 492 U.S. at 591. Endorsement also acknowledges the prominent role symbolism plays in both religion and government and the "'highly charged atmosphere' that develops when the two are intertwined." William P. Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind. L.J. 351, 355 n.23 (1991).[2] No other test addresses those Establishment Clause violations that take place in the transitional zone between government and private speech and action. *Allegheny,* 492 U.S. at 600-01 ("Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message.").[3] Finally, the endorsement test's focus on the particular context of the challenged speech is especially appropriate for religious display cases because the "meaning ascribed to symbols is often a function of the context in which the particular symbol

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[2] "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design. The State announces rank, function, and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and shrine, and clerical raiment. Symbols of State often convey political ideas just as religious symbols come to convey theological ones." *West Virginia Board of Educ. v. Barnette,* 319 U.S. 624, 632 (1943).

[3] "Government promotes religion as effectively when it fosters a close identification of its powers and responsibilities with those of any — or all — religious denominations as when it attempts to inculcate specific religious doctrine." *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 389 (1985).

arises." William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. Cal. L. Rev. 495, 538 (1986).

Conversely, a standard of formal neutrality or one limited to official attempts at proselytizing ignores the subtle power of symbolism and will not prevent the government from lending its "power [and] prestige" to a religious group or from affiliating itself with a religious dogma. *Engel v. Vitale,* 370 U.S. 421, 429 (1962); *Allegheny,* 492 U.S. at 604-09. A lesser standard that would allow government use of religion, short of actual proof of intent to coerce belief or advance religion, would open the door to myriad subtle if not overt acts of religious preference. Such a result would be inconsistent with the core purpose of the Establishment Clause. As Justice O'Connor remarked in *Allegheny,* "the endorsement test asks the right question about government practices challenged on Establishment Clause grounds including challenged practices involving the display of religious symbols." *Id.* at 628 (O'Connor, J., concurring). The test should be applied in this case.

B. The Prohibition on Government Endorsements of Religion Represents a Core Principle of the Establishment Clause.

Endorsement of religion is "a concern that has long had a place in our Establishment Clause jurisprudence." *Allegheny,* 492 U.S. at 592. As early as *McCollum v. Board of Education,* 333 U.S. 203, 209 (1948), and again later in *Engel v. Vitale*, 370 U.S. at 431, 436, this Court identified

state endorsements of religion as an evil the Establishment Clause was designed to prevent.[4]

But this well-founded concern, based on the historic propensity of government toward religious endorsements, predates the Court's modern church-state decisions. According to a leading commentator, state endorsement of religion was equated with "an establishment in the political understanding of the Founder's generation . . .." Douglas Laycock, *Noncoercive Support for Religion: Another False Claim about the Establishment Clause,* 26 Val. U.L. Rev. 37, 42 (1991). Thomas Jefferson and James Madison condemned all forms of endorsement as being inconsistent with principles of nonestablishment. Both leaders believed government lacked the authority (both legal and moral) to make any statements on behalf of religion, advisory or otherwise.[5] Madison wrote that

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[4] *See McCollum,* 333 U.S. at 209 (condemning "the close cooperation between the school authorities and the religious council in promoting religious education."); *Engel,* 370 U.S. at 429 (condemning state actions that emplace an "official stamp of approval" on religion or lend government "power and prestige" to a particular religious belief.).

[5] *See* Jefferson's letter of January 23, 1808, to Rev. Samuel Millar where Jefferson wrote that to issue even unofficial religious proclamations would "indirectly assume to the United States an authority over religious exercises, which the Constitution has directly precluded them from." John F. Wilson and Donald L. Drakeman, eds., Church and State in American History 79 (1987).

Similarly, in 1832 Madison responded to a pamphlet written by Rev. Jasper Adams, nephew and cousin of presidents, that asserted that government had an obligation to promote

government declarations on religion "seem to imply the erronious (*sic*) idea of a national religion." Madison opposed even advisory declarations that evoked no more than a "universal" sense of "devotion to the God of all," stating that the "tendency of the practice, [is] to narrow the recommendation to the standard of the predominant sect." Madison recognized that "[i]n a nation composed by various sects, some alienated widely from others," religious endorsements would undermine the equality that the Constitution sought to ensure.[6]

During the final two decades of the eighteenth century, most states dismantled their religious establishments, doing away with the tax support and ministerial privileges afforded official churches. Initially, a few states sought to retain the legal recognition of Christianity under their new constitutions but quickly dropped such arrangements because they conflicted with the developing understanding of nonestablishment.[7] As Professor Laycock states, "the

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Christianity because the people "had retained the Christian religion as the foundation of their civil, legal and political institutions." Madison unequivocally rejected Adams' thesis, arguing for "an entire abstinence of the Government from interference [with religion] in any way whatever, beyond the necessity of preserving public order, & protecting each sect against trespass on its legal rights by others." Letter to Rev. Jasper Adams, n.d., *id.* at 80-81.

[6] James Madison, "Detached Memoranda" (1832), in Robert S. Alley, ed., James Madison on Religious Liberty 93 (1985).

preponderance of evidence is that opponents of establishment were unwilling to accept even a bare endorsement of the established churches." *Noncoercive Support for Religion*, 26 Val. U.L. Rev. at 42.

Admittedly, the understanding that nonestablishment prohibits government endorsements of religion was not always followed. The history of American political discourse and government action is rife with examples of official endorsements of religion, in most instances endorsements of the prevailing religious hegemony. Throughout the nineteenth century public officials and political leaders tied America's identity and purpose to Protestant Christianity while some sought even to have the country declared a "Christian Nation." *See* Morton Borden, Jews, Turks, and Infidels 54-74, 98-129 (1984).[8] Justice Joseph Story, writing for the Court in 1844,

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[7] In 1784, Virginia passed an act incorporating the Protestant Episcopal Church that granted the church no more than official recognition. Even though the law afforded the church no legal authority or financial benefit, it was repealed three years later after massive protest. A similar example of an early endorsement is found in the South Carolina Constitution of 1778, which declared that "The Christian Protestant religion shall be deemed, and is hereby constituted and declared to be, the established religion of this State." That provision was removed from the 1790 constitution. Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States 67, 81 (rev. ed. 1964); Laycock, *Noncoercive Support for Religion*, 26 Val. U.L. Rev. at 42-45. According to Professor Laycock, "the principle surviving element of these establishments was endorsement of a preferred religion, and those endorsements were unacceptable to opponents of establishment." *Id.* at 42.

[8] In 1858, Iowa Governor Lowe issued a proclamation declaring a day of thanksgiving, stating: "Praise [God] for giving

acceded to the popular view that Christianity was "part of the common law," arguing that "its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against . . .." *Vidal v. Girard's Executors,* 2 How. 127, 198 (1844). Some antebellum judges declared that the duty of government went beyond simply protecting Christianity from all challenges to encouraging citizens in their religious obligations.[9] The perspective that

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this whole land so largely of his Spirit, by which the faces of multitudes have been turned heavenward. Praise him for the Christian's faith, and the spread of our holy religion." David McAllister, Christian Civil Government 107 (1927).

In 1894, Senator Frye of Maine proposed that the Preamble to the Constitution be amended to include an express recognition of God, to wit:

> We the people of the United States, devoutly acknowledging the supreme authority and just government of Almighty God in all affairs of men and nations; greatful to Him for our civil and religious liberty, and encouraged by the assurances of His Word to invoke His guidance as a Christian nation, according to His appointed way, through Jesus Christ, in order to form a more perfect union . . ..

26 Cong. Rec. 1374 (Jan. 25, 1894).

[9] In upholding a conviction for violating a Sunday law, the Pennsylvania Supreme Court stated that "[i]t is of the utmost moment, therefore, that [people] should be reminded of their religious duties at stated periods." *Commonwealth v. Wolf*, 3 Serg. & Rawle 48, 51 (Pa. 1817); *accord Lindenmuller v. The People*, 33 Barb. 548, 560-61 (N.Y. 1861); *Updegraph v. Commonwealth*, 11 Serg. & Rawle 394, 402-03 (Pa. 1824);

government should be aligned with Christianity reached its apex with the Court's *Holy Trinity* decision where Justice David Brewer declared "this is a Christian nation." *Church of the Holy Trinity v. United States,* 143 U.S. 457, 471 (1892).

Notwithstanding such religious pronouncements, by the late nineteenth century an increasing number of judges and public officials came to recognize that any official favoritism toward religion exceeded government authority and violated notions of religious equality. Judge Alfonzo Taft of the Ohio Superior Court wrote in 1870:

> No sect can, because it includes a majority of a community or a majority of the citizens of the State, claim any preference whatever. . . . The State protects every religious denomination in the quiet enjoyment of its own mode of public worship. . . . It is, therefore, an entire mistake, in my opinion, to assert, that the Protestant Christian religion has been so identified with the history and government of our State or country.[10]

Pearce v. Atwood, 13 Mass. 324, 348 (1816); *People v. Ruggles,* 8 Johns. 290, 295-96 (N.Y. 1811). Story argued in his Commentaries on the Constitution of the United States that it was "the especial duty of government to foster and encourage [Christianity] among all the citizens and subjects." 3 Commentaries 603 (4th ed. 1873).

[10] The Bible in the Public Schools – Arguments in the Case of John D. Minor versus the Board of Education of the City of Cincinnati 414-15 (1870). *See also People ex rel. Ring v. Board of Educ.*, 92 N.E. 251, 255 (Ill. 1910) ("The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in

This Court too has since repudiated earlier statements of religious favoritism as being inconsistent with the Establishment Clause. *Lee v. Weisman*, 112 S. Ct. 2649, 2683 (1992) (Scalia, J., dissenting) (criticizing *Holy Trinity*); *Wallace,* 472 U.S. at 52-53 (criticizing Justice Story's Commentaries); *Lynch,* 465 U.S. at 718 (Brennan, J., dissenting) (criticizing *Holy Trinity*). As the Court stated in *Allegheny,* 492 U.S. at 605:

> Whatever else the Establishment Clause may mean (and we have held it to mean no official preference even for religion over nonreligion, see, *e.g., Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989)), it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions). . . . There have been breaches of this command throughout this Nation's history, but they cannot diminish in any way the force of the command.

Accordingly, the no-endorsement principle is thoroughly consistent with our constitutional heritage and has been a recurring theme in church-state jurisprudence. *Widmar v. Vincent*, 454 U.S. 263, 274 (1981); *Stone v. Graham*, 449 U.S. 39, 42 (1980); *Epperson v. Arkansas*, 393 U.S. 97, 106-

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considering men's rights."); *Board of Educ. v. Minor*, 23 Ohio St. 211, 248 (1873) ("[Christianity's] essential interests lie beyond the reach and range of human governments. . . . [N]o government is at all adapted for producing, perfecting, or propagating a good religion."); *accord Knowlton v. Baumhover*, 166 N.W. 202, 212 (Iowa 1918); *State ex rel. Freeman v. Scheve*, 93 N.W. 169, 170 (Neb. 1903); *State ex rel. Weiss v. Dist. Board of School Dist. No. 8*, 46 N.W. 967, 978 (Wis. 1890).

107 (1968); *Abington Township School Dist. v. Schempp*, 374 U.S. 203, 222 (1963); *Engel*, 370 U.S. at 429, 436. The test has appropriately been applied as a separate standard for constitutional adjudication for the past ten years. *Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 248-52; *Allegheny*, 492 U.S. at 593-94; *Texas Monthly*, 489 U.S. at 8-9, 15; *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *School Dist. v. Ball*, 473 U.S. at 389-90; *Wallace v. Jaffree*, 472 U.S. at 56. As articulated by the Court, the endorsement test protects the core purpose of the Establishment Clause by ensuring that government remain truly neutral on religious matters, neither approving nor disapproving of religion. *Allegheny*, 492 U.S. at 627 (O'Connor, J., concurring).[11] The endorsement test has survived careful scrutiny[12] and continues to represent the most appropriate standard for determining

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[11] As discussed in part IIA, *infra*, this form of neutrality is neither formal nor passive but requires government to take affirmative steps to ensure that its actions have not unintentionally created the perception of endorsement of religion. *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring).

[12] *See* Laycock, *Noncoercive Support for Religion*, *supra*; Marshall, *The Concept of Offensiveness*, *supra*; Joseph Richard Hurt, *The Use of Endorsement in Establishment Clause Analysis — The Key to a New Consensus*, 8 Miss. C. L. Rev. 1 (1987); Donald L. Beschle, *The Conservative as Liberal: The Religion Clauses, Liberal Neutrality, and the Approach of Justice O'Connor*, 62 Notre Dame L. Rev. 151 (1987); Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. Rev. 1049 (1986); Marshall, *"We Know It When We See It," supra*; *contra* Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987).

when government actions have crossed the line from permissible accommodations of religion into impermissible favoritism or promotion.

II. CONTRARY TO THE DECISION OF THE SIXTH CIRCUIT, ENDORSEMENT OF RELIGION CAN OCCUR IN A PUBLIC FORUM.

A. The Adoption of a Blanket Rule Upholding Private Religious Speech in a Public Forum Conflicts with this Court's Public Forum Holdings as well as Its Decisions Concerning Endorsement of Religion.

The court of appeals below held that "the Establishment Clause forbids only religious speech sponsored by the government, so 'truly *private* religious expression in a truly *public* forum cannot be seen as endorsement by a reasonable observer.'" Pet. App. A9 *(quoting Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (emphasis in original)). Thi holding represents a rigid, *per se* rule that government endorsement of religion can never occur when private speech takes place in a public forum. Under this holding, a finding of endorsement in a public forum is impossible even though compelling evidence may exist that a local government intends to promote a private religious message or, because of past, direct government involvement with the religious speech, a reasonable observer would perceive government approval of the religious message. So long as the actual speech is by a private individual and takes place in a public forum, then the existence of any government endorsement of that speech becomes irrelevant. In essence, the public forum "trumps" the Establishment Clause, regardless of other factors indicating

religious endorsement.[13] This holding conflicts with the

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[13] That the Sixth Circuit's holding amounts to a rigid, *per se* rule is made clear in its *Americans United* decision. Although the court denied that its holding means the public forum will always "trump" the Establishment Clause, the court also indicated that the sole consideration in such cases was whether the public forum label may have been misapplied. "[I]f such additional facts are not forthcoming, and evidence indicates that an area actually is a traditional public forum, then private groups may express a religious message without a reasonable observer inferring public support of the message." 980 F.2d at 1553; *see also Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160, 1164 (6th Cir. 1993) ("It is settled law in this circuit that a city does not violate the Establishment Clause by permitting a private organization, during the observance of Chanukah, to erect a large unattended menorah in a public square that is a traditional public forum."). These statements are unequivocal.

Two other circuits have made similar broad holdings indicating the application of a blanket rule. In *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1393 (11th Cir. 1993), the Eleventh Circuit wrote: "Precisely because the religious speech is communicated in a true public forum, however, the state, by definition, neither endorses nor disapproves of the speech." In *Doe v. Small*, 964 F.2d 611, 619 (7th Cir. 1992), the Seventh Circuit stated: "Moreover, the mere presence of religious symbols in a public forum does not violate the Establishment Clause, since the government is not presumed to endorse every speaker that it fails to censor in a quintessential public forum far removed from the seat of government." *Contra Kreisner v. City of San Diego*, 1 F.3d 775, 782-86 (9th Cir.), *cert. denied*, 114 S. Ct. 690 (1994); *Smith v. Abemarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir.), *cert. denied*, 496 U.S. 926 (1990).

Court's endorsement decisions and is equally inconsistent with its public forum analysis. The Court should expressly reject this blanket rule for the reasons stated below.

1. Considering the Free Speech issue first, a finding that protected speech takes place in a public forum does not preclude consideration of potential state interests that may require government to restrict that speech. Under public forum analysis, once the speech has been identified as occurring in a public forum, the burden shifts to the government to come forward with a narrowly tailored compelling interest to justify its action. *ISKCON v. Lee*, 112 S. Ct. 2701, 2705 (1992); *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Therefore, the mere fact that protected speech has occurred in a public forum does not mean that a compelling interest cannot exist.

This Court has expressly held that the interest of the state in avoiding Establishment Clause violations may constitute a compelling interest, thereby "justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel*, 113 S. Ct. at 2148 (*relying on Widmar v. Vincent*, 454 U.S. at 271). If this statement has meaning, it is that the avoidance of an endorsement of religion (which may occur through the unattended display of religious symbols at government buildings, *see Allegheny*, 492 U.S. at 598-602) can serve as a compelling interest justifying a restriction on religious speech. If government endorsement cannot constitute a compelling interest under free speech analysis, then the remainder of the *Lamb's Chapel* and *Widmar* opinions – where the Court examined the facts and found no compelling establishment concern in either case – are superfluous. Whether sufficient endorsement exists to

constitute a compelling interest will depend on the facts of each case. *Allegheny,* 492 U.S. at 598. But the clear rule from the public forum cases is that "forum analysis is not completed merely by identifying the government property at issue." *Cornelius,* 473 U.S. at 803. But this is exactly what the Sixth Circuit has done by holding that once private religious speech takes place on a public forum, no appearance of endorsement can be seen to have occurred. Pet. App. A9.

2. The Sixth Circuit's ruling runs afoul of this Court's endorsement holdings as well. As addressed above, impermissible endorsement of religion does not occur solely through the government's own speech but may also occur through "the government's support and promotion of religious communication by religious organizations." *Allegheny,* 492 U.S. at 600-01 ("Indeed, the very concept of 'endorsement' conveys the sense of promoting someone else's message."); *accord School Dist. v. Ball,* 473 U.S. at 389. In both *Lamb's Chapel* and *Widmar*, the Court, after identifying the presence of private speech in what were arguably public fora, still examined the degree of government sponsorship to see whether endorsement had occurred. *Lamb's Chapel*, 113 S. Ct. at 2148; *Widmar,* 454 U.S. at 271-75. Thus, the mere fact that private speech is involved begs the question of whether the state has endorsed that speech.[14] In addition, because the identity of a public forum is not always self-

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[14] The Court's statement in *Mergens,* 496 U.S. at 250, that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," does not contradict this point but reaffirms the potential for government endorsement of private religious speech under circumstances such as those in this case.

evident and frequently turns on interpretations of law as well as facts,[15] it devolves into formalism to hold that the mere presence of a public forum will automatically negate every possible perception of endorsement. Instead, this Court should follow the lead of the Second Circuit Court of Appeals which has held that "[t]he existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989), *cert. denied,* 496 U.S. 926 (1990).

Moreover, endorsement may occur even though the government maintains an access policy that is neutral with regard to religion. *See Allegheny*, 492 U.S. at 600 n.50 ("Even if the Grand Staircase occasionally was used for displays other than the creche . . . it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government."); *Kiryas Joel*, 114 S. Ct. at 2500 (O'Connor, J., concurring);[16] *cf. Doe v. Village of Crestwood*, 917 F.2d 1476

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[15] The Court's recent public forum cases, often containing multiple opinions, indicate the recurring difficulty in determining whether a public forum exists. *See e.g. ISKCON*, 112 S. Ct. 2701; 112 S. Ct. 2709 (1992); *United States v. Kokinda,* 497 U.S. 720 (1990).

[16] Under Establishment Clause precedent, public school officials are prohibited from providing religious groups access to public school students or permitting instruction in religious alternatives to secular materials. *See Edwards v. Aguillard*, 482 U.S. at 593; *Peloza v. Capistrano Unif. School Dist.*, 37 F.3d 517 (9th Cir. 1994); *Washegesic v. Bloomingdale Pub. Schools,* 33 F.3d 679 (6th Cir. 1994); *Berger v. Renssealear Cent. School Corp.*, 982 F.2d 1160 (7th Cir.), *cert denied*, 113 S. Ct. 2344

(7th Cir.), *cert. denied,* 112 S. Ct. 3025 (1992) (city may co-sponsor secular festival but not one holding a Catholic mass). Again, nothing in *Lamb's Chapel* or *Widmar* suggests the opposite. The appearance that flows from providing live access to individuals for a few hours is quite distinct from that arising through the display of unattended, semi-permanent religious symbols on government property. *Allegheny*, 492 U.S. at 612.[17] For example, while the Establishment Clause would permit a religious figure, like the Pope, to conduct a worship service on the national Mall, *O'Hair v. Andrus*, 613 F.2d 913 (D.C. Cir. 1979), it would not permit that same figure to leave a 36 foot Latin cross in front of the national Capitol for several weeks. There is little doubt that a policy permitting groups to erect long-standing religious and secular symbols on government property would run afoul of the Establishment Clause. *Allegheny,* 492 U.S. at 661 (Kennedy, J., concurring in part in the judgment and dissenting in part); *cf. Gonzales v. North Township*, 4 F.3d 1412 (7th Cir. 1993). And, as the decisions indicate, the appearance of endorsement can occur even though the government does not act with the intent or purpose of doing so.[18]

(1993).

[17] "It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting." *Id.*; *accord Smith,* 895 F.2d at 959; *Kaplan,* 891 F.2d at 1030.

[18] *See Lynch*, 465 U.S. at 690 (O'Connor, J., concurring) ("The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.").

3. More particularly, the decision below conflicts with the command of *Allegheny* and *Lynch* that courts must examine the entire context of a display to determine whether impermissible endorsement has occurred. The first rule from *Allegheny* is that such cases are fact sensitive; that the constitutionality of a religious display depends upon its "context" and its particular physical setting.[19] The factors the Court considered in *Allegheny* and that have been applied subsequently by federal courts include the character of the symbol(s) involved (religious or cultural),[20] the location and size of the display,[21] the display's physical setting (whether accompanied by secular items),[22] the duration of the display,[23] and whether the display is accompanied by live individuals to whom the speech may be attributed or whether it stands

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[19] Discussion of the importance of examining the context of a display appears in at least nine separate places in the majority opinion in *Allegheny*. 492 U.S. at 595, 597, 598, 600, 606, 616-17, 618, 620. *Accord Lynch,* 465 U.S. at 678-79.

[20] *Allegheny,* 492 U.S. at 598, 613-17; *Gonzales,* 4 F.3d at 1418; *Ellis v. City of La Mesa*, 990 F.2d 1518, 1525 (9th Cir.), *cert. denied*, 114 S. Ct. 2707 (1994); *Smith*, 895 F.2d at 955; *Kaplan*, 891 F.2d at 1028-29.

[21] *Allegheny,* 492 U.S. at 599-600; *Small,* 964 F.2d at 629; *Smith,* 895 F.2d at 955, 958; *Kaplan,* 891 F.2d at 1029; *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987).

[22] *Allegheny,* 492 U.S. at 599, 616-18; *Doe v. City of Clawson*, 915 F.2d 244, 245 (6th Cir. 1990); *Smith,* 895 F.2d at 955.

[23] *Allegheny,* 492 U.S. at 607-08, 629 (O'Connor, J., concurring); *Small,* 964 F.2d at 613 n.3; *Smith,* 895 F.2d at 955.

unattended.[24] While the presence or absence of any one of these factors is not necessarily determinative of endorsement nor affects the separate status of the free speech interest, they represent important considerations for determining whether impermissible endorsement has occurred. At best, the existence of a public forum, when considered for endorsement purposes, is germane for determining how a particular site affects the endorsement formula. But the mere fact that speech occurs on public forum cannot address whether other factors lead to perceptions of endorsement. *See Widmar*, 454 U.S. at 273-74.[25] The Sixth Circuit's rigid, *per se* rule, by focusing on only one aspect of a display while ignoring all other factors suggesting endorsement, conflicts with the Court's endorsement rulings. *See Lynch*, 465 U.S. at 678 ("[T]he inquiry calls for line-drawing; no fixed, *per se* rule can be framed.").

4. Finally, the Sixth Circuit's holding too readily equates religious speech with all other forms of speech in a manner that devalues the role of the Establishment Clause. *Amici* agree that religious speech is entitled to free speech protection, *see Heffron v. ISKCON*, 452 U.S. 640 (1981); *Fowler v. Rhode Island*, 345 U.S. 67 (1953), and that symbolic speech generally is afforded the same protection as verbal speech. *See e.g. Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *Stromberg v. California*, 283 U.S. 359

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[24] *Allegheny*, 492 U.S. at 599, 612; *Kaplan*, 891 F.2d at 1030.

[25] As example, two circuits have recently found endorsement where private groups erected permanent religious symbols on public property, even though the properties involved were considered public fora. *Gonzales*, 4 F.3d 1412; *Ellis*, 990 F.2d 1518.

(1931). But these principles have their clearest application when the free speech interest stands alone and does not raise Establishment Clause concerns. In certain contexts religious speech and activity are considered unique types of speech and activity and are treated differently by the government. *See Bowen v. Kendrick*, 487 U.S. 589, 621 (1988) (government may fund secular but not religious counseling services); *Lee v. Weisman*, 112 S. Ct. at 2655 (government may not direct or sponsor religious exercises). This distinction between religious and nonreligious speech takes on constitutional significance when government takes steps to support, foster or encourage religious speech. *Allegheny,* 492 U.S. at 600-01. At its core, then, the endorsement test is designed to address this unique quality of religious speech.[26]

Professor Mark Yudof has observed that the Establishment Clause represents "the only substantive constitutional restraint on what governments may say." Yudof, When Government Speaks 214-15 (1983). Although government may speak politically or artistically – and sponsor or fund such activities – it may not do the same with religious speech. In order to maintain this role, the Establishment Clause sometimes inhibits government activity that may contain private speech components. *See Allegheny*, 492 U.S. at 599-601 (noting private group's sponsorship of creche). But this inhibiting role is necessary to effectuate the purposes

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[26] The Sixth Circuit holding also ignores how official and private speech become interrelated and indistinct in many endorsement situations. As Judge Flaum wrote recently in a related case, "[i]n these cases, the line between public and private speech becomes murky, and the speech at issue is not altogether 'private.'" *Doe v. Small,* 964 F.2d at 628 (Flaum, J., concurring in the judgement.).

of the Establishment Clause. As Justice Kennedy has observed, "[t]he First Amendment protects speech and religion by quite different mechanisms. Speech is protected by insuring its full expression even when the government participates . . . . [B]ut the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions." *Lee*, 112 S. Ct. at 2657-58.[27] The Sixth Circuit decision, however, equates religious speech with nonreligious speech regardless of the context and devalues this important role of the Establishment Clause. As such, it fails to acknowledge the unique quality of religious speech.

For the above reasons, the adoption of a blanket rule regarding private religious speech in a public forum is inconsistent with this Court's public forum holdings as well as those decisions concerning endorsement of religion. The adoption of a such a rule for public forum situations imposes formalism on constitutional adjudication and automatically negates compelling Establishment Clause concerns. It should be rejected as an analytical approach in public fora cases.

B. The Display of Respondents' Cross on Capitol Square, When Viewed in its Overall Context, Results in the Appearance of Endorsement of Religion.

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[27] *Accord Flast v. Cohen*, 392 U.S. 83, 104 (1968) ("The Establishment Clause was designed as a specific bulwark against . . . potential abuses of government power" and "operates as a specific constitutional limitation" on other constitutional provisions.); *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, 479 (1982).

Several factors should lead this Court to find that the display of Respondents' Latin cross in front of the Ohio State Capitol results in the endorsement of the religious message represented by the cross. As a threshold matter, no one can dispute the highly religious character of the Latin cross.[28] The cross possesses none of the supposedly cultural attributes of other religious symbols nor is it commonly identified with a particular seasonal event that has taken on secular characteristics. *Allegheny*, 492 U.S. at 613-18. Its message is blatantly religious.

The overall composition and context of the cross display lead inevitably to a finding of endorsement. The State Capitol and its grounds occupy a prominent location in Columbus and are bordered by major thoroughfares. Respondents' Appendix at RA2, RA31-32. The cross is placed directly in front of and stands in close proximity to the Capitol, which serves as both the symbolic and literal seat of state government. Passers-by thus observe the solitary, unattended cross superimposed on this highly recognizable government building.

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[28] As the Ninth Circuit stated recently, "the Latin cross 'is the preeminent symbol of many Christian religions and represents with relative clarity and simplicity the Christian message of the crucifixion and resurrection of Jesus Christ, a doctrine at the heart of Christianity.'" *Ellis*, 990 F.2d at 1525 (*quoting Okrand v. City of Los Angeles*, 254 Cal. Rptr. 913, 922 (Cal. Ct. App. 1989)). *See also Gonzales*, 4 F.3d at 1418; *ACLU v. City of St. Charles*, 794 F.2d 265, 271-72 (7th Cir. 1986); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 14-15 (D.D.C. 1988); *ACLU v. Miss. State GSA*, 652 F. Supp. 380, 384 (S.D. Miss. 1987).

This Court and numerous federal courts have identified the situs of important government buildings as being crucial to findings of endorsement. *Allegheny,* 492 U.S. at 599 (identifying the placement of the creche on the "'main' and 'most beautiful part' of the building that is the seat of county government"); *see also Chabad-Lubavitch v. City of Burlington,* 936 F.2d 109, 112 (2d Cir.), *cert. denied*, 112 S. Ct. 3026 (1992); *Smith v. Albemarle County*, 895 F.2d 953, 958 (4th Cir.), *cert. denied*, 498 U.S. 823 (1990); *Kaplan,* 891 F.2d at 1029; *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 126 (7th Cir. 1987); *ACLU v. City of Birmingham*, 791 F.2d 1561, 1566 (6th Cir. 1986); *Creatore v. Town of Trumbull,* No. 3:94CV2143 (D. Conn. Dec. 20, 1994), *aff'd mem.*, (2d Cir. Dec. 22, 1994); *contra Chabad-Lubavitch v. Miller,* 5 F.3d 1383 (11th Cir. 1993).[29] A typical observer would assume the state controls the grounds surrounding the Capitol and would reasonably think that the cross occupies that location with the support and approval of the government. It cannot be disputed that the placement of the cross *at this location* carries even greater probability of endorsement than its erection on some other public park. *Kaplan,* 891 F.2d at 1029 ("the park involved is not any city park, but rather City Hall Park."). Finally, the facts in the instant case suggest that the Respondents expressly sought out

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[29] *See also Doe v. Small*, 964 F.2d at 619 (upholding religious display on public forum "far removed from the seat of government"); *Flamer v. City of White Plains*, 841 F. Supp. 1365, 1368 (S.D.N.Y. 1993) (same). Even the Sixth Circuit is undecided whether to attach any significance to the placement of religious symbols at or near core government buildings. *See Congregation Lubavitch v. City of Cincinnati,* 923 F.2d 458, 459-60 (6th Cir. 1991) (distinguishing *Americans United* by noting that Cincinnati Fountain Square "has no particular connection with any government buildings or functions").

Capitol Square because of its significance as the seat of government and for the symbolic association that would be drawn between the cross and the state government. Petition for Writ of Certiorari at 4. The significance of this location as suggesting endorsement cannot be overstated.[30]

Moreover, the cross stands alone. Unlike the creche in *Lynch* and the menorah in *Allegheny,* the cross is unaccompanied by any secular or neutralizing symbols but stands in stark isolation. Like the creche in *Allegheny,* "nothing in the context of the display detracts from [its] religious message." 492 U.S. at 598. The cross also is not attended by live individuals to whom observers can attribute the cross' religious message. As the Court observed in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 809 (1984), the difference between live speakers and symbolic speech is that in the former situation, "individual citizens [are] actively exercising their right to communicate directly with potential recipients of their message." *Accord Allegheny*, 492 U.S. at 599, 612 (where the Court noted the affect that individuals have toward diffusing appearances of endorsement). By contrast, with unattended religious symbols, no one is available to associate with the message, thus leaving observers to surmise the identity of the speaker. The unattended symbol loses its value as independent speech. This is what distinguishes unattended religious displays from

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[30] Accordingly, *amici* contend that the display of the unattended menorah at the same location is equally invalid. The issue of whether the state may distinguish between types of religious symbols – the menorah and the cross – is not in doubt. Government may not prefer one religion over another; nor may it define one religion's symbol as cultural or seasonal in order to provide it with special access. *Kiryas Joel,* 114 S. Ct. at 2491.

the *Widmar*-type of equal access situations involving live speakers. With no one present to claim authorship or responsibility for the speech, the government becomes the surrogate, the sponsor of the speech.[31]

The duration of the display also suggests government endorsement of the cross' religious message. As proposed in Respondents' application, the cross was to stand for a lengthy period of time (sixteen days) in front of the State Capitol. The semi-permanent nature of the cross highlights the appearance of state endorsement by dominating the forum for an extended period and excluding other speakers. *Accord Doe v. Small*, 964 F.2d at 629 (Flaum, J., concurring). Such appearances of endorsement are especially likely for observers who may pass by the unattended display several times during the sixteen day period.

Finally, the unattended display of inherently religious symbols at core government areas engenders religious divisiveness, the avoidance of which has been a long-standing goal of nonestablishment.[32] Religious divisiveness is a theme

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[31] Because of the other factors suggesting state endorsement of private religious speech, the disclaimer sign is ineffective to negate the endorsement. *Allegheny*, 492 U.S. at 600-01. Moreover, as is evident from photographic exhibit reproduced in Petitioners' Appendix A43, the size and physical make-up of the sign render any disclaimer contained on the sign ineffective to most passers-by.

[32] *See* James Madison's Letter to Thomas Jefferson of August 20, 1785, commenting on the "mutual hatred" between Presbyterians and Episcopalians that was "much inflamed by the late act incorporating the latter." Alley, James Madison on Religious Liberty at 69. *See also* Madison's "Memorial and

that the Court has expressed in its Establishment Clause decisions for many years.[33] As Professor Phillip Johnson has remarked, "[o]ne major objective of the First Amendment is to keep the public peace on religious issues, and one way of doing this is for every religious and antireligious group is to feel that government is neither squarely on its side or squarely on the other side." Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 Cal. L. Rev. 817, 839 (1984). Because religious controversies have the potential to stir animosities, the Court has been wary of government actions that inherently invite divisiveness among religious groups. *See Kiryas Joel,* 114 S. Ct. at 2504 (Kennedy, J., concurring in the judgment); *Lee*, 112 S. Ct. at 2655-56. Moreover, avoidance of religious divisiveness can be seen as another goal of the endorsement test. *Allegheny,* 492 U.S. at 626-27 (O'Connor, J. concurring.). Religious divisiveness is a natural outgrowth of perceptions that government has made religion relevant to a person's standing in the political community. *Id.; accord Lynch*, 465 U.S. at 687-88 (O'Connor, J., concurring) (endorsements "foster the creation of political constituencies defined along religious lines").

Remonstrance" arguing that the general assessment bill "will destroy that moderation and harmony" between religious sects and lead to "animosities and jealousies, which may not soon be appeased." *Id.* at 58-59.

[33] *PEARL v. Nyquist*, 413 U.S. 756, 797-98 (1973) (divisiveness is a "warning signal no to be ignored"); *Lemon v. Kurtzman*, 403 U.S. 602, 622-23 (1971); *Walz v. Tax Commission*, 397 U.S. 644, 494 (1970); *McCollum v. Board of Educ.*, 333 U.S. at 217.

The erection of an inherently sectarian symbol such as a cross near an important government building invites religious divisiveness. As Justice Kennedy has recognized, "[t]he urge to use [religious symbols] to teach or taunt is always present." *Allegheny,* 492 U.S. at 678 (Kennedy, J., concurring and dissenting). Nonadherents who perceive a close relationship between the government and the religion represented by the cross may feel that their beliefs are being disfavored and may agitate for similar treatment. And, as occurred in this case, opponents of the symbol's message may resort to vandalism or other violence. Pet. App. A4. As Justice Stevens has observed, there is always a risk that the visible display of a religious symbol "will offend nonmembers of the faith being advertised and well as adherents who consider the particular advertisement disrespectful." *Id.* at 650-51 (Stevens, J., concurring in part and dissenting in part). Instead of achieving ecumenical goals, religious displays tend to emphasize religious differences and "foment . . . disagreements." *Id.*

The potential for religious divisiveness instructs against allowing unattended, solitary religious symbols to be erected at or near important government buildings. Regardless of whether divisiveness is considered an aspect of endorsement or as a complementary test, it is a factor that should be considered when determining if a religious display violates the Establishment Clause.

Considering the entire context of the cross display, its location next to the State Capitol, and the fact that it is an unattended, free-standing religious symbol with no secular or cultural attributes, this Court should find that government endorsement of religion has occurred.

CONCLUSION

For the aforementioned reason, *amici* pray that the Court reverse the decision of the Court of Appeals.

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APPENDIX

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public interest organization committed to preserving the constitutional principles of religious liberty and separation of church and state. Since its founding in 1947, Americans United has participated either as a party or as *amicus* in many of the leading church and state cases decided by this Court, including filing an *amicus* brief on behalf of the petitioners in *Lamb's Chapel v. Center Moriches School District*. Americans United members adhere to various religious faiths, with some holding no religious affiliation. They are united, however, in their commitment to the constitutional principle of church-state separation which, at its core, prohibits government actions that create the appearance of endorsement of religion.

The American Jewish Committee

The Americans Jewish Committee ("AJC"), a national organization of approximately 50,000 members founded in 1906, is dedicated to the defense of the civil rights and religious liberties of American Jews. These rights and liberties, however, can only be secure for Jews when they are equally secure for Americans of all other faiths. AJC is committed to the belief that separation of religion and government is the surest guarantee of religious liberty for all and has proved of inestimable value to the free exercise of religion in our pluralistic society. In the view of the AJC, display of a Latin cross or menorah or any comparable religious symbol in a public area represents official

endorsement of a religious message that violates the Establishment Clause of the First Amendment.

People For The American Way

People For the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. People For has frequently represented parties and filed *amicus curiae* briefs in litigation seeking to defend First Amendment rights, including cases concerning freedom of expression and separation of church and state. As in the *Lamb's Chapel* decision, People For believes that both the Free Speech Clause and the Establishment Clause of the First Amendment must be applied in situations like this one concerning religious expression and activities involving government and public forums. People For has joined in filing this *amicus* brief in order to help vindicate the important First Amendment principles at stake in this case, particularly the principle that the "no-endorsement" standard should continue to be utilized in evaluating the constitutionality of religious expression on government property.

The Union of American Hebrew Congregations (UAHC)

The Union of American Hebrew Congregations (UAHC) represents 1.5 million Reform Jews in 850 congregations nationwide. For over a century, the UAHC has fought for religious liberty and tolerance, believing these to be

among the greatest gifts America has bestowed upon the world. The UAHC has staunchly supported reading the Establishment Clause of the First Amendment of the United States Constitution as constructing a wall of separation between church and state, and believes this wall has been crucial to the freedom we, as a religious minority, have enjoyed in this country.

Americans Civil Liberties Foundation of Vermont

Americans Civil Liberties Foundation of Vermont, Inc., is a state affiliate of the American Civil Liberties Union, a national organization dedicated to preserving the principles embodied in the Bill of Rights. ACLF of Vermont has sponsored three cases in the last ten years which have asserted that the display of an inherently religious symbol in a public area, closely associated with government, represents official endorsement of religion and thus violates the Establishment Clause. The decision of the court of appeals below conflicts with the holdings of two of these cases, *Chabad-Lubavitch v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), and *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989).

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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board,
Ronald T. Keller, Daniel Shellenbarger,
and Ohio Senator Richard T. Finan,

Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and
Knights of the Ku Klux Klan,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF CHABAD HOUSE OF WESTERN MICHIGAN, INC.; CONGREGATION LUBAVITCH OF CINCINNATI, OHIO; CHABAD-LUBAVITCH OF VERMONT; CHABAD-LUBAVITCH OF GEORGIA; CHABAD LUBAVITCH OF BROWARD & PALM BEACH COUNTIES; CHABAD OF PITTSBURGH; AND LUBAVITCH OF INDIANA, INC., AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICI

This brief is filed pursuant to Rule 37.3 with the consent of the parties.

The *amici* are local organizations affiliated with the world-wide Lubavitch movement, which seeks to educate the Jewish people, to encourage and facilitate religious observance by all Jews, and to promote universal respect for Jewish traditions and practices. During the eight-day Jewish holiday of Chanukah, each of the *amici* has sought to display a large menorah in its own community at one or more central locations — frequently including a public park or square. The purpose of this display is to demonstrate how the religious holiday is traditionally observed and to publicize the Chanukah miracle.

These efforts to deliver a religious message to Jews and non-Jews who visit traditional public forums have embroiled the *amici* in federal-court litigation. As a result of this litigation, the *amici* secured rulings from two *en banc* courts of appeals establishing the constitutional proposition on which the court of appeals relied in this case. We briefly summarize the history of the *amici*'s litigation.

1. In one case municipal authorities permitted the local Lubavitch organization to include a menorah in a municipally sponsored holiday display, but a private group filed suit to exclude the menorah. This resulted in this Court's decision in *Allegheny County v. ACLU*, 492 U.S. 573 (1989), in which the presence of a menorah in Pittsburgh's "combined" holiday display on the steps of City Hall was held by this Court to be constitutionally permissible.

2. In some other cities, the local Lubavitch organization was permitted, during Chanukah, to display its privately financed menorah, standing by itself, in a public forum. Those displays were also challenged by citizen groups that claimed to be defending the "wall of separation" allegedly mandated by the Establishment Clause of the First

Amendment. In a case involving the City of Grand Rapids, Michigan, a federal district court determined that the display of a solitary menorah in a traditional public forum by Chabad House of Western Michigan violated the Establishment Clause. A panel of the Court of Appeals for the Sixth Circuit affirmed that decision by a 2-to-1 vote. *Americans United for Separation of Church and State v. City of Grand Rapids*, 922 F.2d 303 (6th Cir. 1990). On rehearing *en banc*, the Sixth Circuit held by a 9-to-6 vote that the menorah could be displayed because the display of a private religious symbol at a traditional public forum is absolutely protected by the Free Speech Clause of the First Amendment. *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992). That decision was the precedent on which the court below relied in the case that is now before this Court.

3. In other jurisdictions, as well, these *amici* have been successful in asserting their First Amendment free-speech rights to display a menorah at a traditional public forum. For example, the City of Cincinnati refused to permit such a display at Fountain Square — a public forum that is remote from government buildings. Congregation Lubavitch of Cincinnati won a preliminary injunction and, thereafter, a permanent injunction against that policy. *Congregation Lubavitch v. City of Cincinnati*, 923 F.2d 458 (6th Cir. 1991); *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993). The same has been true in White Plains, New York. *Flamer v. City of White Plains*, 841 F. Supp. 1365 (S.D.N.Y. 1993).

4. In Atlanta, Georgia, a 15-foot-high menorah was authorized in 1989 on the plaza in front of the State Capitol Building. After an application for such a display was denied in 1990 on technical grounds, Chabad-Lubavitch of Georgia sought permission to display a menorah in 1991

in the Capitol Rotunda — an open space under the dome — which had previously been the site of other unattended displays. A district court sustained the state's exclusion of the menorah on summary judgment, and a split panel of the Eleventh Circuit affirmed. *Chabad-Lubavitch of Georgia v. Miller*, 976 F.2d 1386 (11th Cir. 1992). On rehearing *en banc*, the Eleventh Circuit unanimously vacated the panel opinion and held that Chabad had a First Amendment free speech right to display its menorah in the public forum that the state had created. *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993).

5. In the Second Circuit, a decision by the City of Burlington, Vermont, to permit the private display of a menorah by Chabad-Lubavitch of Vermont resulted in a 2-to-1 constitutional ruling that barred the display under the Establishment Clause. *Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990). The City of Burlington thereafter turned down an application to display a menorah under slightly different circumstances, and the Second Circuit refused to overrule the *Kaplan* decision in *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992).

The present case presents the constitutional issue that these *amici* have litigated, with frequent success, in the lower federal courts. We are, of course, not in sympathy with the Knights of the Ku Klux Klan. We unequivocally condemn the organization's racism and anti-Semitism. The message of hate that the KKK transmits to its followers is repulsive to these *amici*, and we support all measures that the law countenances to prevent and combat the KKK's activities.

The courts below have, however, accepted the factual proposition that, in this case, the KKK was seeking only to convey a religious message for a limited period of time coincident with a religious holiday season. This case comes to this Court in that context, and the constitutional issue presented is whether a private organization has the constitutional right to display a religious symbol in a public forum that is closely associated with the seat of government. Since the *amici* firmly believe that the answer to this abstract constitutional issue must be affirmative and the *amici* have successfully urged that proposition before various lower federal courts, we file this brief in support of the constitutional position being argued by a group that is otherwise an enemy of the Jewish people.

ARGUMENT

Introduction

This case concerns (1) speech (2) in a public square (3) by a private group. The combination of these three elements ordinarily guarantees constitutional protection under the First Amendment. Streets and public parks owned and regulated by governments of free societies have always been places where individual citizens are encouraged to exchange ideas and to debate public issues. Speaker's Corner at London's Hyde Park is the paradigmatic model of free expression. Neither the petitioners nor any of the *amici* who support them are asking the Court to abandon this traditional hallmark of an open democracy.

They seek an exception to the guarantees of the First Amendment only because of three characteristics that, they say, justify denying the protection of the First Amendment to the respondents' display of a religious symbol at Columbia's Capitol Square.

First, they argue that religious speech should not receive the protection given to secular speech.

Second, they contend that solitary, unattended religious symbols are not entitled to the protection given to spoken secular expression.

Third, they maintain that religious speech next to an important government building is different from such speech in a location that is remote from a government structure.

They assert that these three distinctions are compelled by the Establishment Clause of the First Amendment because government may not support or endorse religion. The petitioners and their *amici* do not, of course, claim that government is *actually* supporting or endorsing religion when it permits a private group to display a religious symbol at a public forum that adjoins a "core" government building. They argue only that such a display could be *mistakenly* construed by reasonable spectators as a governmental expression of support for the religion whose symbol is displayed. We submit this *amicus* brief to point up the extraordinary perniciousness of this doctrine. The proposition petitioners are advocating is that public error or misconception should override or "trump" a constitutional right. According to petitioners, speech that falls objectively within the range of expression protected by the Constitution is to be deprived of its impregnable constitutional shield only because misinformed people may fail to understand who the speaker truly is.

I

A CONSTITUTIONAL LIBERTY SHOULD NOT BE SACRIFICED TO AVOID PUBLIC ERROR

We know of no other constitutional liberty, in the Bill of Rights or elsewhere, that has been denied or restricted in any way because its exercise may result in a mistaken perception by the public. Constitutional rights must be protected by judges regardless of passing popular whims. They should surely be protected against the currents of popular misconception.

A. *The Establishment Clause Does Not Reward Error.*

Petitioners and their *amici* read into the Establishment Clause a concept that does not appear in its words and that does not emerge from its history. The Clause prohibits any "law respecting an establishment of religion." It does not prohibit any "law *that appears to respect* an establishment of religion." The draftsmen of the First Amendment did not confuse perception — even if it be reasonable misperception — with reality. They prohibited governmental conduct that *actually* establishes religion. Petitioners and their *amici* unjustifiably want the constitutional prohibition extended to conduct that may look to uninformed spectators as if it establishes religion.

Who is to decide whether there is a real likelihood of misperception? What evidence is to be presented to enable the court to determine whether the public labors under a "reasonable" misperception that government is endorsing religion? Whether the public *in fact* perceives certain governmental conduct as constituting government endorsement of religion may be discerned by conducting a

public opinion survey. Should the constitutional right to engage in private religious speech depend on such surveys?

The ramifications of this "misperception doctrine" are enormous once the petitioners' principle is applied to other forms of government conduct challenged under the Establishment Clause. If "reasonable" members of the public misperceive the exemption of houses of worship from local property taxes as government endorsement of religion, is tax exemption to be prohibited by the Establishment Clause? Compare *Walz v. Tax Comm'n of New York City*, 397 U.S. 664 (1970). If the public believes that governmental employment of a sign-language interpreter in a Catholic parochial school is endorsement of Catholicism, is the practice to be prohibited notwithstanding *Zobrest v. Catalina Foothills School Dist.*, 113 S.Ct. 2462 (1993)?

To be sure, this Court has inquired in past cases whether government appeared to be "endorsing" religion. But the "endorsement" test has heretofore been invoked only where government is truly the speaker. Whether a creche or menorah *displayed by the government* amounts to an unconstitutional endorsement may depend on how the public perceives the religious symbol. If it is placed at a location where only governmental announcements appear or only governmental functions take place, its presence at that restricted location may amount to endorsement. If it is part of a larger governmental display whose overall effect is not religious, it may pass muster.

But that does not mean that *private* speech should be judged by whether onlookers perceive it to be what it is or whether they misperceive it to be governmental speech. A "reasonable observer" should have no misperception of governmental endorsement of truly private displays because the "reasonable observer" must be presumed to understand

the nature of a public forum. Any other application of the "reasonable observer" standard would turn the "observer" into a heckler who has the power to expel private speech from a public forum because of his or her own ignorance of free speech traditions.

Finally, public perception may and should be affected by this Court's articulation of constitutional principles. If the Court were firmly and unequivocally to hold that government is not to be held responsible for the content of private speech in a traditional public forum, that holding would ultimately become part of the public's understanding of such a forum. If, on the other hand, this Court were to hold in this case that religious speech in such a forum may be barred because the public may misperceive it as official governmental endorsement, that holding would increase the likelihood that such expression would erroneously be attributed to the government in the future.

B. *The Government, Not a Private Speaker, Has the Burden of Preventing Error.*

If, as the petitioners and their *amici* contend, there is a serious danger that "reasonable observers" will mistakenly think that government is sponsoring religious displays in public forums adjoining government buildings, and if this danger threatens values protected by the Establishment Clause, there is a strikingly simple remedy. Government should clear the air of this misconception. Notices may be posted on and near the government structure warning the public that *all* expression in the public square is private expression. It is the government's duty, not the duty of private speakers, to educate the public on the meaning and uses of a "traditional public forum." And it is unsound public policy — as well as poor constitutional principle — to

shift that burden to the individuals who use to a public forum to deliver their private message to willing listeners.

We acknowledge that governmental agencies have routinely required groups seeking to display messages in a public forum to post signs announcing that the display is private speech and is not sponsored or endorsed by the municipality or the state. Since the burden is minimal, private speakers, including these *amici*, have, in the spirit of accommodation, displayed such written disclosures.

But that is a gratuitous private assumption of a burden that belongs with the government. It is government that regulates access to the public square, and government alone controls the appearance of the square throughout the year. Government should, therefore, post notices that say, in substance, "This is a public forum open to the private expression of views. Statements made at this location and displays that are exhibited here are not official government expressions and are not endorsed by the government." The *only* burden that might then be imposed on the private speaker is to label the display with a sign identifying the particular private organization or individual who is speaking.

Petitioners and their *amici* are not content with shifting the burden of conveying this clarification to private religious speakers. Their view is that because the public is, or may be, unaware of this quality of a public forum, speakers on religious subjects may be excluded entirely from the public square. That attitude perpetuates ignorance while suppressing a constitutional liberty.

II

PRIVATE RELIGIOUS SPEECH IS CONSTITUTIONALLY ENTITLED TO NO LESS PROTECTION THAN PRIVATE SECULAR SPEECH

The Establishment Clause obviously inhibits the government's authority to "speak" on religious subjects. Government may surely not issue official pronouncements that support one religion, all religions, or, for that matter, promote disbelief in religion. The ban against any "law respecting an establishment of religion" means that government must remain silent or neutral in the sphere of religion.

But that restriction is wholly inapplicable to *private* speech. A private citizen's freedom to speak in a public forum may not be circumscribed on account of the content of his speech. A private citizen is as free to talk about religion as to talk about politics or sports.

Petitioners and their *amici* argue for special constitutional rules governing private religious speech that would permit its suppression depending on the form of the speech (*i.e.*, whether it is an oral utterance or an "unattended display") and on its location (*i.e.*, whether it is in a public park that is near a government building). Such special rules plainly would not apply to private secular speech. An individual who wanted to discuss the subject of AIDS research, or abortion rights, or affirmative action would not be barred from expressing his or her views through an unattended display or sign. Nor would he or she be restricted in any manner from speaking in a public park that is adjacent to Town Hall or to some other government building.

Private religious speech is not the First Amendment's stepchild. It is entitled to at least the same constitutional dignity as secular speech enjoys. Indeed, the Free Exercise Clause accords religious speech a preferred position. If, as is frequently true, an individual is motivated by religious conscience to erect a religious display at a public forum, his expression constitutes the free exercise of religion that the Religion Clause explicitly protects. Telling a religious observer that he may not place an "unattended display" such as a menorah in a public square or excluding his display from a public square that abuts Town Hall may inhibit his religious observance. It amounts to hostility against, not security for, religious observance. It is, therefore, *less* tolerable under our Constitution than similar restrictions on secular speech which is unprotected by the Religion Clause.

A rule that suppresses religious speech in the public forum while protecting secular speech expressed in the same manner at the same place degrades religion, in violation of the nation's history and traditions. We have composed a rhyme, quoted in *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1394 n. 17 (11th Cir. 1993):

> There once was a young rabbi of Chabad
> Who thought the Constitution was odd
> To protect private speech in a public place
> On AIDS, abortion or race,
> But to prohibit anyone's mention of God.

III

A TEMPORARY RELIGIOUS DISPLAY, EVEN IF SOLITARY AND UNATTENDED, IS ENTITLED TO THE CONSTITUTIONAL PROTECTION GIVEN TO EXPRESSION

Petitioners and their *amici* do not contend that symbols and displays are outside the protection of the Free Speech Clause of the First Amendment. They argue only that a display that is "solitary" and "unattended" is more likely to be misperceived as governmental expression than a display that does not stand alone or one that is accompanied or held by a live person.

(1) "Solitary" — The constitutional protection granted to oral expression has never been thought to depend on the number of speakers who are simultaneously at the public forum. Nor does it depend on the content of what others are saying. Speaker's Corner in London's Hyde Park is as accessible to one speaker as it is to twenty. A rule excluding the "solitary" speaker from the public forum would penalize those who are most pioneering and original — those who choose unpopular times to speak or unusual means of communicating their messages.

The same is true of displays. The fact that a display stands alone is not a reason to expel it. If it leads the way, others will likely follow. The display that is "solitary" today will probably not lack for company tomorrow. The facts of this case prove the point. The KKK applied for a permit to erect its symbol on the day that a permit to erect a menorah was granted.

Prohibiting the "solitary" menorah because no one else accompanies it with a secular display at Capitol Square

during the eight days of Chanukah would also make the rights of Jewish speakers depend on whether others choose to speak through displays at the same time. That is simply not a recognizable or acceptable constitutional principle.

A "solitary" display on public property is no more likely to be misperceived as governmental expression than a "solitary" speaker. Few government speakers wear government uniforms. A passerby who sees and hears a "solitary" speaker in a public park has no way of knowing whether the "solitary" speaker is or is not a governmental official. A passerby who sees a menorah or some other religious symbol standing by itself in a public park will probably also see an accompanying sign identifying its private sponsor. Hence "solitariness" is less likely to lead to misperception in the case of a display than in the case of a human speaker.

(2) "Unattended" — The notion that a display held or accompanied by a human being is entitled to broader constitutional protection than one that is "unattended" is singularly irrational. The petitioners and their *amici* attach no constitutional significance to whether the person attending the display speaks or remains mute. Their quarrel is entirely with a display that stands by itself. But a menorah or any other religious symbol conveys the same religious message whether or not a human being stands next to it or holds it. And the presence or absence of a person sheds no light on whether the display is governmental or private. Indeed, one could reasonably conclude that permitting the Pope to conduct a religious service on the National Mall implies *greater* governmental endorsement of a religious message than permitting a private unattended religious display at the same location.

We acknowledge that the erection of a *permanent* structure on government property is entirely different, for constitutional purposes, from a temporary seasonal display. When government permits a structure or symbol to stand permanently — or for extended periods of time — on government property, the message conveyed by the symbol may become the government's message. That result is not a misperception; it is a correct understanding of what the government is doing when it allocates government property in a disproportionate way. *Access* to public parks is one thing; *control* over public space is quite another. And when a religious group — or any group identified with a particular point of view — is permitted to monopolize public space, the line between access and control has been crossed.

When an unattended private religious display is permitted to stand on public property for the limited period of a religious holiday, it merely reflects the public's respect for diverse religious beliefs. Since the site is a traditional public forum, the onlooker must be presumed to know that many private unattended displays are permitted there. Many displays may deal with secular subjects, and some will relate to religion. And in no event — unless clearly indicated by their context — is it government that is expressing the message.

IV

A TEMPORARY RELIGIOUS DISPLAY AT A PUBLIC FORUM HAS THE SAME CONSTITUTIONAL PROTECTION WHETHER OR NOT A GOVERNMENT BUILDING IS NEARBY

The petitioners' final point of distinction is the proximity of a "core" government building. They argue that the same religious display may be constitutionally permissible in a public forum that has no adjacent government buildings (*e.g.*, Cincinnati's Fountain Square) but is constitutionally prohibited if an important official structure is within an onlooker's view (*e.g.*, Burlington's City Hall Park). The basis for this distinction is, presumably, that the "reasonable" observer is more likely to mistake the private display for governmental expression if a government building is also in the viewer's eye as he gazes at the display.

Whatever psychologists may say of this form of mental association — an association that seems equally effective if a picture or drawing of a recognizable government building appears on the display, regardless of the display's location — it has no real-life basis in contemporary experience. In the 1990's government officials do not address the public by posting notices in front of Town Hall or by erecting displays near government buildings. Lafayette Park in Washington, D. C., is not viewed as the President's lectern merely because the White House is across the street. Nor is the Mall perceived as the channel through which Congress communicates with its electorate simply because the United States Capitol is visible wherever one stands on the Mall.

The constitutional rule advocated by the petitioners — barring religious expression close to a government building — would silence religious speech in the most central and prominent sites in American cities. The Establishment Clause does not exile religious speech to the suburbs. If religious speech is constitutionally protected in a suburban park, it may be heard in the shadow of the Capitol.

CONCLUSION

This case tests the respect given private religious expression in American society. Petitioners and their *amici* believe that the Constitution relegates private religious speech to the status of a stepchild. Religious speech is not entitled, in their view, to all the constitutional safeguards that secular speech enjoys, and particularly not to the access that secular speech has to the traditional public forum. If religious speech is given the same status as secular speech, say the petitioners and their *amici*, the Free Speech Clause will always "trump" the Establishment Clause.

That assertion mistakenly presumes that the Establishment Clause bars private speech. In fact, the Establishment Clause does no such thing. It bars only *actual*, not perceived, governmental endorsements of, or imprimaturs upon, religion. What the Free Speech Clause "trumps" are efforts based on error and misperception to suppress religious speech.

For the foregoing reasons, the ruling of the Sixth Circuit that religious displays are constitutionally entitled to access to a public forum should be affirmed.

Respectfully submitted,

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QUESTION PRESENTED

Whether the state may use the Establishment Clause as an excuse to censor private persons' and organizations' religious speech in a public forum, despite the Free Speech Clause's general prohibition of content-based restrictions on speech in public fora?

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In The

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-780

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SCHELLENBARGER, AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS *

The American Center for Law and Justice ("ACLJ") is a national, nonprofit legal organization whose purpose is to preserve, protect, and promote religious liberty through education, legal defense, legislative assistance, and related

*. The parties in this case have consented to the filing of this brief by letters of consent filed with the Clerk of the Court.

activities. ACLJ attorneys specialize in advocating the rights of freedom of speech, conscience, and religion. The ACLJ's Chief Counsel has argued cases before this Court dealing with issues related to this case. Included among those cases are *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993) and *Board of Education v. Mergens*, 496 U.S. 226 (1990), both of which the Sixth Circuit properly relied upon in its decision in this case.

The ACLJ files this brief in support of the respondents because the State of Ohio's argument, an argument echoed in other cases—that government may censor private religious speech in a public forum for fear that some may mistakenly attribute that speech to the state and conclude the state is endorsing a particular religious belief—is antithetical to the First Amendment Free Speech Clause and is dangerous to the free speech rights of religious speakers. The ACLJ supports the Sixth Circuit's holding that truly private religious speech in a public forum cannot violate the Establishment Clause.

SUMMARY OF ARGUMENT

1. The Establishment Clause, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, restricts only government action. The state of Ohio[1] has not compelled, encouraged, assisted, sponsored, supported, endorsed, or given special preference to the Klan's expression. By allowing the Klan to erect its cross, the state merely would have been allowing the Klan to exercise its right to free speech. This Court's state action cases, from *Shelley v. Kraemer*, 334 U.S. 1 (1948), to the

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1. For ease of reference, we will refer to the Petitioners, a state agency and members of that agency, as the "state."

present have made clear that a state generally is not responsible for private action—that is, that private action is not state action—unless the state has compelled or significantly encouraged that private action. Merely allowing a private actor to perform an action that would violate the Constitution if performed by the state is not state action. Because the state would neither have been compelling nor encouraging the Klan's expression by simply allowing that expression in a public forum (the same way the state must allow any other speech in a public forum), allowing the Klan to erect its cross would not have been state action, and therefore could not have violated the Establishment Clause.

2. Even if merely allowing private speech in a public forum is sufficient state action to warrant constitutional scrutiny, allowing private speech in a public forum does not violate the Establishment Clause. The state argues that the existence of a religious symbol on public property may send a message of state endorsement for religion. This Court has rejected this very argument three times. See *Widmar v. Vincent*, 454 U. S. 263 (1981); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1943). In any event, the state does not endorse speech merely by allowing that speech in a public forum because it is unreasonable to conclude, given that the Free Speech Clause does not allow content-based speech restrictions of speech in public fora, that the state endorses speech it fails to censor. The state must thus depend on the argument that some hypothetical observer might perceive that the state is endorsing speech it allows in a public forum. But this "perceived endorsement" argument is flawed. It blurs the line between state and private action, at the expense of private speech rights. It makes free speech rights depend on

the uniformed perceptions of others, thus importing into free speech jurisprudence an "Ignoramus's Veto" akin to the heckler's veto this Court has long rejected. The "perceived endorsement" test also targets religious speakers for special disabilities, despite this Court's admonition in *Mergens*, 496 U. S. at 248, that the Establishment Clause does not license government to target religious speakers for unique disabilities. In short, the state's Establishment Clause argument is merely a rationalization for censoring disfavored religious speech; this Court ought to reject that rationalization out of hand.

I. THE ESTABLISHMENT CLAUSE RESTRICTS ONLY GOVERNMENT ACTION; MERELY ALLOWING FREE SPEECH, WITHOUT COMPELLING OR ENCOURAGING THAT SPEECH, IS NOT SUFFICIENT GOVERNMENT ACTION TO IMPLICATE THE ESTABLISHMENT CLAUSE.

The essential facts in this case are simple and few. The Ku Klux Klan, a private organization, sought, without any governmental encouragement, assistance, sponsorship, or support, to erect a Latin Cross on Capitol Square in Columbus, Ohio. The state refused to allow the Klan to erect its cross because the cross's message is religious. Capitol Square, as the state concedes (see Petition for Certiorari at 4), is a public forum, which for many years has been available for speech and expressive activity (including the erection of free-standing displays[2]) by many different groups.

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2. The state does not (and cannot) contest that the Klan's public display of a Latin cross constitutes an exercise of the right to freedom of speech. Cf. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538,

See *Pinette v. Capitol Square Review and Advisory Board*, 844 F. Supp. 1182, 1183-85 (S.D. Ohio 1993).

2541-42 (1992) (burning a cross is protected expressive activity); *Texas v. Johnson*, 491 U.S. 397, 402-06 (1989) (flag burning is protected expressive conduct). This Court has recognized the powerful, emotive force of such displays of symbols and emblems. *See, e.g., Johnson*, 491 U.S. at 405. Furthermore, the Klan's display of a Latin Cross is consistent with historic antecedents. Phillip Davidson, *Propaganda and the American Revolution* 184-86 (UNC Press 1941). Those who fomented revolution and founded our Republic were, like the Klan here, convinced that such publicly displayed emblems served powerfully to bring cohesion to the colonists. Thus, the practice of publicly erecting a Liberty Pole, a Liberty Pillar, or a Liberty Tree, was widely adopted. *Id.* at 185-86.

And just as the Klan's activity here has led to controversy, so too did the symbolic displays of emblems by our revolutionary forbearers. For example,

> The New York Sons of Liberty had a trying time with their Liberty Pole. One was erected in 1766 on city property but was later destroyed, and the city officials refused to allow another to be set-up, even if it was given to the city. The Liberty Boys then bought a piece of ground and raised one, but the troops attacked it. This time, the Liberty Boys were on hand, and a fight ensued, the Golden Hill affair, in which several people were hurt.

Davidson, at 185-86 (footnote omitted).

Certainly the average colonist did not think that parliament, crown, or colonial governors had erected the Liberty Poles. Certainly the average Ohioan would not have thought the state had erected the Klan's Latin Cross.

The state asserts that it had to censor the Klan's religious expression because allowing the cross in Capitol Square would have violated the First Amendment's Establishment Clause. That clause provides that "*Congress* shall make no law respecting an establishment of religion . . . . " U.S. Const. amend. I, cl. 1 (emphasis added). This Court has held that the Establishment Clause's restriction on Congressional power is applicable to the states by virtue of incorporation through the Due Process Clause of the Fourteenth Amendment. *Wallace v. Jaffree*, 472 U.S. 38, 49-51 (1985). The Due Process Clause provides that no "*State* [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1, cl. 3 (emphasis added).

Like most constitutional provisions protecting individual liberty (the major exception being the Thirteenth Amendment, which prohibits slavery), the First and Fourteenth Amendments restrict only government action. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). "This fundamental limitation on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State . . . responsibility for conduct for which [it] cannot fairly be blamed.'" *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)). Individual and private associational freedom—the freedom of the Klan and its members to enjoy the same free speech rights as any other citizens—is the crux of this case. On their face, the Establishment and Due Process Clauses make plain that if the Ku Klux Klan wants to promote "Christianity,"[3] those

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3. This is not to say that we agree that the Klan promotes Christianity in any meaningful sense of the word. The district court

constitutional provisions have nothing to say about the matter. But the state seeks to curtail the Klan's freedom to speak by having this Court impose responsibility on the *state* for the religious message of the Klan's speech, thereby allowing the state to exclude that speech from a public forum.

This Court implicitly recognized that the Establishment Clause reaches only governmental action when it recognized the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990). The speech at issue in this case is private speech, not government speech. The state did not seek to endorse religion by erecting a cross in Capitol Square; the Klan did. The state neither coerced nor encouraged the Klan to put up a cross in Capitol Square. The state did not help pay for the Klan's expression, sponsor that expression, or endorse that expression. If the state had allowed the cross, it would not have been giving the Klan's religious expression

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in this case summed up the feelings of most reasonable people about the Klan but, perhaps more importantly, also summed up the role those feelings should play in determining the Klan's free speech rights:

> It is ironic and in the most literal sense diabolical that a group bearing this name would seek to publicly display the symbol of Jesus of Nazareth known to Christians and non-Christians alike as the Prince of [P]eace. It should be obvious, however, that the constitutional right of freedom of speech would be meaningless if it did not apply equally to all groups, popular and unpopular alike.

844 F.2d at 1187.

any special preference, since a state generally may not restrict or exclude speech in a public forum based on the content of the speech. See *Perry Educational Association v. Perry Local Education Association,* 460 U. S. 37, 45 (1983).

In essence, the state argues that simply allowing religious speech in a public forum—or, put another way, allowing religious speakers to exercise their free speech rights—is sufficient state action to implicate the Establishment Clause. But this Court's cases firmly establish that merely allowing a private party to do an act that would violate the Constitution if done by the state does not make the private act state action for which the state is responsible.

This Court recognized this point in *Shelley v. Kraemer*, 334 U.S. 1 (1948). In *Shelley,* property owners sought to convey their property to black buyers despite restrictive covenants forbidding sales to blacks. State courts enforced the restrictive covenants, in effect requiring the sellers to discriminate against the black buyers. *Id.* at 4-7. This Court held that the state courts' enforcement of the covenants amounted to state action depriving the buyers of equal protection of the laws. *Id.* at 23.

Shelley did not hold that the restrictive covenants themselves violated the Equal Protection Clause. In fact, the Court noted that private adherence to the covenants would not have violated the Clause. *Id.* at 13. In *Shelley*, the state courts, by enforcing the covenants, were compelling the sellers to discriminate rather than merely allowing them to discriminate. The Court made this distinction clear:

> [T]hese are not cases . . . in which the states have merely abstained from action, leaving private

> individuals free to impose such discriminations as they see fit. Rather, these are cases in which the states have made available to such individuals the full coercive power of the government to deny petitioners, on the grounds of race or color, the enjoyment of property rights . . . which the grantors are willing to sell.

Id. at 19.

Subsequent cases from this Court highlight this distinction. For example, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), this Court held that Pennsylvania's extensive regulation of the operations of private clubs serving alcoholic beverages did not constitute state action implicating Pennsylvania in a Moose Lodge's policy of refusing to serve black guests. See *id.* at 171-79. Although state regulation of private clubs was pervasive, this Court held that the regulations, with one exception, did not "in any way foster or encourage racial discrimination." *Id.* at 176-77. The one exception was an administrative regulation requiring the Lodge as a condition of its liquor license to "adhere to all provisions of its Constitution and By-Laws." *Id.* at 177 (internal quotation and citation omitted). Because the Moose Lodge's constitution required racial discrimination, the regulation requiring adherence to that constitution compelled the Lodge to discriminate; thus, the Court struck down that regulation to the extent it required Moose Lodge to comply with its discriminatory constitution. See *id.* at 178-79 ("the result of [the regulation's] application in a case where the constitution and bylaws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule").

In *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), a woman sued to enjoin a private warehouseman from selling property pursuant to a New York statute that allowed warehousemen to sell goods to recoup unpaid storage charges. The woman alleged that the sale would violate the Due Process Clause. *Id.* at 153. The woman argued that the sale amounted to state action because the New York statute "authorized and encouraged it." *Id.* at 164. This Court scotched that argument, holding that "'a state is responsible for the . . . act of a private party when the state, by its law, has compelled the act.' This Court, however, has never held that a state's mere acquiescence in a private action converts that action into that of the state." *Id.* at 164 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

Other cases from this Court reiterate the point that a state is not responsible for a private action the state merely has allowed rather than compelled or encouraged. Thus, for example, in *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522, 546-47 (1987) this Court found no state action in the USOC's choice of how to enforce its governmentally-conferred exclusive right to use the word "Olympic" where there was "no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right." In *Blum v. Yaretsky*, 457 U.S. 991, 1002-12 (1982), this Court held that the state was not responsible for doctors' decisions regarding the level of nursing home care Medicaid patients are entitled to receive, despite extensive state funding and regulation of those nursing homes. And in *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982), the Court held that the state was not responsible for a private school's firing of a teacher, despite the fact that public funds accounted for 90% to 99% of the school's budget and the school's students were placed in the school by the state.

This Court's state action cases teach generally that a state "'normally can be responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state].'" *San Francisco Arts & Athletics*, 483 U.S. at 546 (citing *Blum*, 457 U.S. at 1004); see also *Lebron v. National Railroad Passenger Corporation*, 115 S.Ct. 961, 979 (1994) (O'Connor, J., dissenting) ("the conduct of a private actor is not subject to constitutional challenge if such conduct is fundamentally a matter of private choice"). In other words, the state is not responsible for private conduct that it has neither coerced nor encouraged. It follows that merely allowing a private citizen to express himself , without more, does not make the state responsible for that expression.

This general rule—distinguishing private initiative from government compulsion—developed for the most part in cases involving racial discrimination, an action the Constitution does not affirmatively protect. See, e.g., *Irvis*, 407 U.S. at 176-77. Where the state, as in this case, merely allows a citizen to exercise his constitutionally protected right to free speech, it would be counterintuitive to hold the state responsible for that speech and its content. The whole point of the Free Speech Clause is to prevent government from interfering with the right to free speech. If the state is not responsible for private action the state could have proscribed, the state could not be responsible for private action it has no right to proscribe in the first place. Since the state in this case in no way compelled or encouraged the Klan's religious expression, the state cannot be responsible for that expression. Thus, the Klan's expression could not violate the Establishment Clause.

This Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), does not require a different result. In *Burton*, a Delaware state agency leased space in a parking garage to a private restauranteur, which proceeded to discriminate against black customers. This Court cited a number of factors, including the fact that the state stood to profit from the restaurant's discrimination, *id.* at 723-24, which led the Court to conclude that the state had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity. . . ." *Id.* at 725. The facts in this case bear no resemblance to the facts in *Burton*. Certainly, the state is not claiming that it has "insinuated itself into a position of interdependence with" the Klan.

The *Burton* Court did state that "[b]y its inaction, the Authority . . . has elected to place its power, property, and prestige behind the admitted discrimination." *Id.* at 725. But when the Court referred to "inaction," it was referring to the state's failure to require the restaurant "to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise *as a consequence of state participation.*" *Id.* (emphasis added). In other words, a state may not enter a joint venture with a private party and then wash its hands of any constitutional violations the private party commits. The state's "inaction" thus is relevant only when state participation in a venture is present in the first place. Here, there was no state participation in the Klan's speech. In any event, more recent cases such as *Irvis*, *Flagg Brothers*, and *Blum* firmly establish that absent the type of unusual circumstances found in *Burton*, a state's merely allowing private activity does not make the state responsible

for that activity.[4] That would seem to be especially so in a case such as this, since "inaction" regarding the content of a citizen's expression is precisely what the Free Speech Clause commands. See *R.A.V v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992) (content-based regulation of speech is presumptively invalid); *Perry Education Association*, 460 U. S. at 45.

Nor does *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991) require a finding of state action in this case. In *Edmonson*, this Court held the State responsible for a private litigant's racially discriminatory exercise of peremptory challenges in a civil case. See *id.* at 2082-87. One could argue that when a court strikes a juror on a litigant's exercise of a peremptory challenge, the state merely is allowing private action. But *Edmonson* did not hold that merely allowing private action constitutes state action. Instead, the *Edmonson* Court emphasized that "a private party could not exercise its peremptory challenge absent the overt, significant assistance of the court." *Id.* at 2084. In this respect, *Edmonson* applied the holding in *Shelley v. Kraemer* that a state violates the Equal Protection Clause when it uses its courts' coercive power to give effect to private discrimination. See *Lebron*, 115 S. Ct. 980 (O'Connor, J.,

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4. Whether *Burton* even retains any vitality is questionable. See *Lebron*, 115 S. Ct. at 979 (O'Connor, J., dissenting) (citing Laurence Tribe, *American Constitutional Law* §f 18-3, at 1701 n. 13 (2d ed. 1988)). In any event, the *Burton* Court itself recognized that its holding was narrow, emphasizing that its decision depended on the peculiar facts of that case. See *Burton*, 365 U.S. at 726. This Court in a later case noted that *Burton* had limited its holding "to lessees of public property." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974). See *Lebron*, 115 S. Ct. at 979 (O'Connor, J., dissenting).

dissenting). Moreover, *Edmonson* emphasized that jurors exercise traditional government functions, so that when a government allows litigants peremptory challenges, the government "confers on a private body the power to choose the government's employees or officials. . . . " 111 S. Ct. at 2085. Private parties to whom the government delegates the power to choose government officials must exercise that power in a race-neutral manner. *Id.*

Neither of the rationales relied on by *Edmonson* justifies a finding of state action in this case. A speaker, even in a public forum, need not await the state's overt and significant assistance in exercising his right to free speech. *Shelley's* coercion rationale does not apply in this case because the state has not coerced the Klan to speak. Moreover, the Free Speech Clause and this Court's public forum cases make clear that choosing the content of a citizen's expression in a public forum is not a traditional government function.

The lack of state action here distinguishes this case from this Court's holding in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), that a creche display inside the Allegheny County Courthouse violated the Establishment Clause. Because the creche was not displayed in a public forum, *Allegheny* involved elements of preference or favoritism, which can be construed as government endorsement or encouragement. See *id.* at 600 n. 50. It is only because of this preference that the government in *Allegheny* could be said to have done more than merely allowing citizens to exercise their free speech rights. *Allegheny* thus involved state action that is not present in this case.

The understanding that only state action can violate the

Establishment Clause, and that merely allowing religious speakers to exercise their free speech rights does not constitute state action, also resolves the "tension" the state perceives between the Free Speech and Establishment Clauses. The Free Speech Clause commands that government must allow private speech in a public forum despite its content; only government action violates the Establishment Clause; merely allowing private speakers to speak in a public forum does not make the government responsible for the private speech; thus, merely allowing speech in a public forum does not violate the Establishment Clause. This is the primary reason the Sixth Circuit was correct when it effectively held in this case that truly private speech in a public forum cannot violate the Establishment Clause; truly private speech—speech the state has not compelled or encouraged—is not state action. Any "tension" this holding creates between the Establishment and Free Speech Clauses is a figment of the state's imagination.[5] Because the mere act of allowing private speech in a public forum is not state action sufficient to implicate the Establishment Clause, this Court should affirm the Sixth Circuit's decision that private speech in a public forum does not violate the Establishment Clause.

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5. Likewise, the state action requirement answers the Second Circuit's concern, echoed by the state, that the public forum doctrine may somehow "swallow up the Establishment Clause." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989). Private speech in a public forum—speech for which the state is not responsible—cannot "swallow up" a restriction on government conduct. The Sixth Circuit, unlike the second, merely has recognized the "crucial difference between *government* speech. . . and *private* speech" (*Mergens*, 496 U.S. at 250) that is necessary for purposes of constitutional analysis.

II. THE STATE'S ARGUMENT THAT IT MUST CENSOR THE KLAN'S RELIGIOUS EXPRESSION LEST AN OBSERVER CONCLUDE THAT THE STATE ENDORSES CHRISTIANITY IS INCONSISTENT WITH THIS COURT'S PRECEDENT, CONFLICTS WITH THE FREE SPEECH CLAUSE, AND PERPETUATES DISCRIMINATION AGAINST RELIGIOUS SPEAKERS.

A. This Court Three Times Has Rejected the State's Endorsement Argument.

Even assuming that merely allowing private religious speech in a public forum is somehow state action subject to constitutional scrutiny, that action does not violate the Establishment Clause. The state argues that the existence of a religious symbol on public property may send a message of endorsement for the religious sentiment expressed by that symbol. But even assuming state action, this argument still ignores the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U. S. 226, 250 (1990).

The Establishment Clause does not forbid private citizens such as the Klan and its members from endorsing religion, and the state has not actually endorsed the Klan's message. Thus, how does the Klan's message become the state's message? The state's argument must rest on one of two bases. The first of these bases is that merely allowing private religious expression in a public forum can somehow by itself constitute actual governmental endorsement of that religious

expression. This concept of "actual" endorsement rests on the notion that government endorses speech that it does not censor. If this first basis crumbles, the second basis for the state's endorsement argument must be that even if the state cannot be said to have actually endorsed the Klan's speech, observers in the general public may not realize that government does not endorse expression it fails to censor or that the Klan's expression is private expression. Thus, observers in the public may perceive governmental endorsement of religion even if no actual endorsement exists; and the possibility of this "perceived endorsement" is sufficient in itself to violate the Establishment Clause.

Arguments of this flavor have been presented to and rejected by this Court several times. In *Widmar v. Vincent*, 454 U. S. 263 (1981), this Court held that when a state university creates an open forum for student groups to meet, it may not deny use of that forum to students who want to meet for religious discussion or worship. *Id.* at 267-77. The state in *Widmar* argued that to allow religious groups to use the open forum would violate the Establishment Clause. The Court rejected this argument primarily because of the broad range of speech allowed in the forum. When government facilities are open generally for speech purposes, allowing religious speakers to use those facilities "does not confer any imprimatur of State approval on religious sects or practices." *Id.* at 274. Allowing access to an open forum to religious groups no more commits the state to religious goals than it does to the goals of any other group using the forum. See *id.*

In *Mergens*, this Court upheld the constitutionality of the Equal Access Act, 20 U. S. C. § 4071-74 (1988). That Act generally prohibits public secondary schools that provide opportunities for non-curriculum-related student groups to

meet from discriminating against student groups based on the religious, political, or philosophical content of the students' speech. See generally *id.* This Court rejected the school district's "perceived endorsement" argument in *Mergens*. The Court found that the proposition that the government does not endorse all it fails to censor "is not complicated," 490 U. S. at 250, and that students would likely understand that by allowing religious speech on the same terms as other speech, the school is not endorsing that speech. See *id.* Indeed, this Court found that the Act's open-access policy does not send any message of endorsement: "[A] school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.* at 252.

Finally, in *Lamb's Chapel v. Center Moriches Union Free School District,* 113 S. Ct. 2141 (1993), this Court held that discriminating against religious speakers in granting access to public facilities violates the Free Speech Clause. The defendants in *Lamb's Chapel,* like the state in this case, attempted to justify their discrimination by arguing that allowing the religious speech would have violated the Establishment Clause because it was possible that the community would think the district was endorsing religion. Finding "no realistic danger" of perceived endorsement, *id.* at 2148, the Court had "no. . .trouble" rejecting the state's argument. *Id.*

Widmar, Mergens, and *Lamb's Chapel* all rejected the notion that government may discriminate against private speech so that observers will not infer the government endorses that speech by permitting it. These cases establish that allowing private religious speech on the same terms as

any other speech does not violate the Establishment Clause. There is no sound reason for this Court to accept the state's endorsement argument in this case after rejecting similar arguments in *Widmar, Mergens,* and *Lamb's Chapel*. In fact, an examination of that argument's premises and implications reveals an argument this Court should reject as fundamentally at war with the Free Speech Clause and the free speech rights of religious speakers.

B. The State's Argument is Inconsistent With The Free Speech Clause.

As noted, any argument that the state actually has endorsed the Klan's religious expression in this case must rest on the premise that the state endorses all speech in a public forum that it fails to censor. That premise is sound only if government has a right to censor speech in a public forum in the first place. But the Free Speech Clause prohibits content-based censorship in public fora; consequently, the notion that the government endorses all speech in a public forum that it fails to censor is "absurd." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers*, 81 NW. U. L. Rev. 1, 14 (1986). It denies reality to suggest that government endorses the wildly divergent views expressed in a public forum—including views critical of the government—merely because the government refuses to violate the Constitution by suppressing those views. This holds just as true for religious speech as it does for any other speech. Cf. *Widmar,* 454 U. S. at 274 (an open access policy '"would no more commit the [state]. . . to religious goals,'" than it would commit the state to the goals of "any other group eligible to use its facilities") (citation omitted).

The endorsement argument's fallback position is that, even if the state cannot be said to endorse all it permits, observers in the general public may not know that, or may not realize that private speech in a public forum actually is private. Thus, observers may perceive endorsement, even where none exists. But this "perceived endorsement" argument allows a private citizen's free speech rights to depend on the misperceptions of others. The "perceived endorsement" argument thus smuggles back into free speech jurisprudence something akin to the heckler's veto. By way of the heckler's veto, states would attempt to justify silencing speakers because of the possibility that their otherwise constitutionally-protected speech would provoke an unruly response from listeners. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 401 (1989); *Street v. New York*, 394 U. S. 576, 592 (1969). This Court has rejected that rationale for censorship. See *Johnson*,491 U.S. at 408-10; *Street*, 394 U.S. at 592; cf. *Coates v. City of Cincinnati*, 402 U. S. 611, 615 (1971) ("our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms [of assembly and association]"). Police may not squelch an unpopular speaker simply because his speech may make a crowd unruly. Instead, "the police must permit the speech and control the crowd." *Hedges v. Wauconda School District*, 9 F.3d 1295, 1299 (7th Cir. 1993); see *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966) (plurality opinion) ("Participants in an orderly demonstration in a public place are not chargeable with the danger that, unprovoked except by the fact of the constitutionally protected demonstration itself, their critics might react with disorder or violence"); cf. *Schneider v. State*, 308 U. S. 147 (1939) (if leafletting causes litter, proper response is to punish the litterbug, not censor the leafletter).

Just as it has rejected the heckler's veto, this Court should reject what the Sixth Circuit aptly termed the "Ignoramous's Veto," that the state seeks to smuggle into free speech jurisprudence by way of its "perceived endorsement" argument. *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc). Just as the heckler's veto left a person's free speech rights at the mercy of bystanders who disagreed with the speech, so the "Ignoramous's Veto" leaves religious speech rights at the mercy of "those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine." *Id.* (quoted in *Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 675, 679 (6th Cir. 1994)). As the Seventh Circuit put it, "just as bellicose bystanders cannot authorize the government to silence a speaker, so ignorant bystanders cannot make censorship legitimate." *Hedges*, 9 F.3d at 1299-1300.

If the state is concerned that some of its citizens do not understand free speech rights and thus might perceive that the state is endorsing religious speech it does not censor, the state should educate its citizens about the Free Speech Clause and explain that the only thing it is "endorsing" is the right of all citizens to speak freely. But if some fail to get the message, censorship still is not the proper response. "Private errors do not justify discrimination against speech. Otherwise, some persons' failure to understand the meaning of the first amendment. . . would become an occasion for curtailing the scope of that amendment." *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring).

C. The State's Argument Subjects Religious Speakers to Special Disablities.

The "perceived endorsement" argument represents a unique danger to religious speech rights. By finding Establishment Clause violations even where the state has done nothing to aid, encourage, sponsor, support, or endorse religion, the argument blurs the line between state and private action and in the process restricts religious freedom and free speech. Because governmental endorsements, perceived or otherwise, of subjects other than religion are not normally thought to be of constitutional concern, the perceived endorsement test targets religious speakers for special disabilities not imposed on other speakers. The test really is nothing more than a rationalization for censoring private religious speech. As such, the "perceived endorsement" argument disserves both the Religion Clauses and the Free Speech Clause because it restricts private action and cabins religious freedom and free speech by denying religious adherents the same right to speak that other citizens have.

The discrimination against religious speakers cuts against the thrust of cases such as *Widmar, Mergens,* and *Lamb's Chapel*, all of which rejected attempts to treat religious speakers less favorably than other speakers. The Establishment Clause neither requires nor justifies the discrimination the perceived endorsement test would perpetuate. As *Mergens* made clear, '"The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.'" 496 U. S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment)).

Justice Brennan, in his concurrence in *McDaniel,* succinctly summed up the reasons why this Court should reject the "perceived endorsement" argument:

> Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause. . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

McDaniel, 435 U. S. at 641. The state, by its "perceived endorsement" test, is attempting to use the Establishment Clause as a "sword to justify repression of " the Klan's religious expression. This Court should remove the blade from that sword by rejecting the "perceived endorsement" test and hold, as the Sixth Circuit did, that private religious speech in a public forum cannot violate the Establishment Clause.

CONCLUSION

This Court should affirm the Sixth Circuit's decision that private speech in a public forum does not violate the Establishment Clause. Merely allowing private speech in a public forum is not state action subject to constitutional scrutiny. In any event, the Establishment Clause does not justify censorship of private religious speech based on the state's fear that some uninformed observer may not understand that the state is not endorsing that speech by failing to censor it.

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CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER, and OHIO SENATOR RICHARD T. FINAN,
Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, and KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Writ of Certiorari to the Sixth Circuit Court of Appeals

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INTEREST OF AMICI CURIAE

Amici Curiae file this brief in support of Respondents. The Specific statements of Amici Curiae are set forth in Appendix B.[1]

SUMMARY OF ARGUMENT

Capitol Square is a traditional public forum open for expressive activities. Historical, secular and religious expression occurs in Capitol Square including the display of free-standing objects. The year prior to the incident leading to this case, the Governor, himself, dedicated a religious Menorah in Capitol Square. The State of Ohio actually approved the display of the Menorah and a Christmas tree, but disapproved of the Klan's cross primarily because the State is opposed to the Klan's message. The State excluded only the Klan's cross, but allowed the display of the Christmas tree and the Menorah, arguing that the Menorah was not religious and that the State was compelled to exclude the Klan's cross because it was religious. In an open forum, the government may not exclude religious speech on the basis that to allow such speech would violate the Establishment Clause. In an open forum, the Establishment Clause is not even implicated. To the contrary, in an open forum the Establishment Clause is violated when the government excludes religious speech solely because of the content. To exclude such speech is both a violation of the Free Speech Clause and the Establishment Clause. In this case, the State further violated the Establishment Clause by preferring one religion (Jewish Menorah) over another religion (Klan's cross).

The cross has differing meanings to various observers, both secular and sectarian. In an open forum, the government need not entangle itself with whether the Christian symbol has become sufficiently secularized, because religious speech can not be excluded no matter how secular or sectarian.

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[1] Amici Curiae file this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 36.2 of the Rules of this Court.

Finally, the selective exclusion of the Klan's cross while allowing secular and other sectarian speech, violates the Klan's free exercise rights. The display of the cross is part of the Klan's sincerely-held religious belief and selective exclusion of that sectarian view while allowing secular and other sectarian speech violates the Klan's freedom of religion.

ARGUMENT

I.

SPEAKERS WITH A RELIGIOUS MESSAGE ARE ENTITLED THE SAME ACCESS TO TRADITIONAL PUBLIC FORA AS SPEAKERS WITH A SECULAR MESSAGE.

A. Private Religious Speech In A Traditional Public Forum Does Not Implicate The Establishment Clause.

The First Amendment Free Speech Clause protects the free flow of ideas in a democratic society. The right to free speech lies "at the foundation of free government by free men." *Arlington County Republican Committee v. Arlington County*, 790 F. Supp. 618, 621 (E.D. Va. 1992) (quoting *Schneider v. State*, 308 U.S. 147 (1939)). "The constitutional right of free expression is . . . intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Simon & Schuster v. New York Crime Victims Board*, 112 S. Ct. 501, 508 (1991).

"To ascertain what limits, if any, may be placed on protected speech, [this Court has] often focused on the place of that speech, considering the nature of the forum the speaker seeks to employ." *Frisby v. Schultz*, 487 U.S. 474, 479 (1988). *See also Heffron v. ISKCON*, 452 U.S. 640 (1981) (hereinafter "*Heffron*");

United States v. Kokinda, 497 U.S. 720 (1990). Indeed,

> [p]ublic places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places. The recognition that certain government owned property is a public forum provides open notice to citizens that their freedoms may be exercised there without fear of a censorial government, adding tangible reinforcement to the idea that we are a free people.

ISKCON v. Lee, 112 S. Ct. 2711, 2716-2717 (1992) (Kennedy, J., concurring) (hereinafter "*ISKCON*").

Parks, public streets and sidewalks "have immemorially been held in trust for the use of the public . . . and are properly considered traditional public fora." *Frisby*, 487 U.S. at 480-481. *See also Perry Education Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983). "The purpose of the public forum doctrine is to give effect to the broad command of the First Amendment to protect speech from governmental interference." *ISKCON*, 112 S. Ct. at 2717 (Kennedy, J., concurring). This Court has stated:

> In these quintessential public fora, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end . . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.

Frisby, 487 U.S. at 481 (quoting *Perry Education Ass'n.*, 460 U.S. at 37).

This Court has acknowledged the right of religious speakers to use public forums on equal terms with others.[2] *See Widmar v. Vincent*, 454 U.S. 264, 272 n.12 (1981); *Tilton v. Richardson*, 403 U.S. 672 (1971); *ISKCON*, 452 U.S. at 640; *Saia v. New York*, 334 U.S. 558 (1948). Even though "public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection." *McDaniel v. Paty*, 435 U.S. 617, 640 (1978)(Brennan, J., concurring); *see also Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949); *Cantwell v. Connecticut*, 310 U.S. 296, 309-310 (1940). The mere fact that the government wishes to reduce or eliminate religious strife and entanglement "does not place religious discussion, association, or political participation in a stratus less preferred than rights of discussion, association, and political participation generally." *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring). "Adherents of particular faiths and individual churches frequently take strong positions on public issues including . . . vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970).

Capitol Square is a traditional public forum. *See* Petition for Certiorari (hereinafter "P.C.") 4,5, A2, A14, A28; Respondents' Brief in Opposition to Petition for Certiorari (hereinafter "R.B.") 3 n.5, 4. Petitioners do not dispute this public forum designation. P.C. 3, 18; Petitioners' Reply Brief to Res. Opposition to Petition

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[2] The Fourteenth Amendment is also implicated because the State's action is content-based. *See, e.g., Burson v. Freeman*, 112 S. Ct. 1846 (1992); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971).

for Cert. (hereinafter "P.R.B.") 1, 2.[3] The State of Ohio owns Capitol Square and erected the State's capitol building (hereinafter "Statehouse") on that property. P.C. 4, 5, A2, A14, A28. Capitol Square is located in downtown Columbus, Ohio. P.C. 4, 5, A2, A14, A28. For more than a century the Statehouse has housed both chambers of the Ohio General Assembly as well as the offices of the Governor and other statewide officeholders. P.C. 4, 5, A2, A14, A28. Capitol Square grounds are made available for speeches and public gathering by groups advocating various causes, both secular and religious. P.C. 4, 5, A16, A30; P.R.B. 6.[4] Capitol Square has also been used for unattended displays. P.C. A16, A30; P.R.B. 6. These include a State-sponsored Christmas tree and a free standing Menorah[5] sponsored by the Lubavitch sect. P.C. 5, 30; R.B. 3,4,7, A13. The Menorah is a nine-armed candelabrum that serves as the primary symbol of the Jewish holiday of Hanukkah. This Court in *Allegheny* stated that "[t]he menorah . . . is a religious symbol." *Allegheny*, 492 U.S. at 613.[6]

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[3] "Capitol . . . grounds are available for use by the public . . . for free discussion of public questions . . . ." Ohio Administrative Code § 128-04-02(A).

[4] During hearings, evidence revealed that political speeches, gay rights demonstrations, anti-war demonstrations and other demonstrations regarding various types of public issues were routinely permitted on Capitol Square, as well as booths and other displays erected during art festivals, a united campaign "thermometer," the State Christmas tree and the Menorah. R.B. A15-A16.

[5] This free-standing Menorah had no disclaimer and was dedicated by Ohio's Governor in 1993. *See* R.B. A23. (Governor dedicating menorah. Plaintiffs' Supplemental Exhibit No. 101).

[6] Cantor Jack Chomosky of Tifereth Israel Congregation in Columbus, Ohio, testified as an expert that the Menorah permitted by the State of Ohio, like other Chanukah Menorahs, "is a religious symbol. It is used in conjunction with fulfilling the obligations incumbent upon a Jew for the celebration of Chanukah." *See* R.B. 8. Further, Mr. Chomosky took "exception" to the State's contention that the Menorah was a seasonal

Petitioners argue that excluding religious speech in the form of displays is necessary in order to abide by the Establishment Clause. P.C. 3, 9, 11, 24, A15; P.R.B. 6, 8. However, nothing could be further from the truth. The "State's goal of preventing sectarian bickering and strife may not be accomplished by regulating religious speech and political association." *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring); *see also*, P.R.B. 5. The fact that the Klan's "public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection." *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring); *see also Cantwell*, 310 U.S. at 309-310; cf. *Terminiello*, 337 U.S. at 4-5; R.B. 5.

Petitioners fear that the "public forum doctrine would swallow up the Establishment Clause." P.C. 3; P.R.B. 8. This argument has already been addressed and disposed of in *Widmar*. In that case, eleven students of the University of Missouri at Kansas City brought suit to challenge a University regulation prohibiting a religious group from meeting in University facilities on equal terms with other students' organizations. *Id.* at 265-66. Unlike the case at hand, the University was not a traditional public forum. *Id.* at 267-268; P.C. 3, 18; P.R.B. 1, 2. Nonetheless, this Court announced that "[t]he Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place." *Widmar*, 454 U.S. at 267-268. This Court noted that religious worship and discussion "are forms of speech and association protected by the First Amendment," *Id.* at 269, and "[i]n order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University . . . must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Id.* at 269-70.

The University in *Widmar*, like the Petitioners in this case, claimed that the discriminatory exclusion of religion was based on

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display and "not a religious symbol." *See* R.B. 8.

the University's compelling interest in abiding by the Establishment Clause. P.C. 9, 11, 24, A15; P.R.B. 6; *see also Widmar*, 454 U.S. at 271-72. This Court dismissed the argument by explaining that on an open-forum policy, ensuring nondiscrimination against religious speech is a secular purpose and avoids entanglement with religion. *Widmar*, 454 U.S. at 271-72.

This Court has prescribed the "reasonable observer's" standard to determine whether a display gives the appearance of government endorsement. *See Allegheny*, 492 U.S. at 620; *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor J., concurring in part and concurring in judgement). This endorsement test

> is not based on perceptions of the ill-informed, first-time visitor who simply views a religious symbol in a government building without regard to public forum issues . . . "This hypothetical observer is informed as well as reasonable; we assume that he or she is familiar with the history of the government practice at issue, as well as with the general contours of the Free Speech Clause and the public forum doctrine. . . . Our observer realizes that [the public fora at issue] host an eclectic range of uses throughout the year."

Chabad-Lubavitch of Georgia v. Miller, 5 F.3d 1383, 1391 n.11 (11th Cir. 1993) (en banc) (quoting *Kreisner v. City of San Diego*, 988 F.2d 883, 892 (9th Cir. 1993)). A reasonable observer viewing a private, religious, unattended display in a public forum would not perceive such display as an "endorsement" or "disapproval" of their individual religious choices. *See Allegheny*, 492 U.S. at 620; *Witters*, 474 U.S. at 493 (O'Connor J., concurring in part and concurring in judgement). For purposes of the Establishment Clause, allowing the Klan's religious display conveys a message of

openness and plurality to all observers.[7] *See Allegheney*, 492 U.S. at 620; *Witters*, 474 U.S. at 493 (O'Connor J., concurring in part and concurring in judgement).

Furthermore, this Court stated that the primary effect of an open forum does not advance religion because "an open forum in a public university does not confer any imprimatur of state approval on religious sects and practices." *Widmar*, 454 U.S. at 274. Private religious speech in a traditional public forum cannot violate the Establishment Clause because it does not even implicate the Clause. *See Widmar*, 454 U.S. at 273-74; *see also McDaniel*, 435 U.S. at 640 (Brennan, J., concurring). If anything, an open forum policy prevents violations of the Establishment Clause by insulating the government from the necessity of scrutinizing the content of the citizenry's speech. *See Widmar*, 454 U.S. at 277-78; *Chabad-Lubavitch of Georgia*, 5 F.3d at 1391. Petitioners do not have a compelling state interest. As such, Petitioners' content-based discrimination against the Klan's cross is a violation of the Free Speech Clause.

B. Selective Exclusion Of A Privately Sponsored Cross In A Traditional Public Forum Is An Unconstitutional Content And Viewpoint-Based Restriction.

1. Allowing secular speech but prohibiting religious speech is a content-based restriction.

In *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992), this

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[7] Lower courts have cautioned against the "Ignoramus's Veto." "The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine." *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir.1992) (en banc); *see also Chabad-Lubavitch of Georgia*, 5 F.3d at 1391 n.11.

Court noted that "[t]he First Amendment generally prevents government from proscribing speech, or even expressive conduct because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *Id.* at 2542. "The First Amendment does not permit [government] to impose special prohibitions on those speakers who express views on disfavored subjects." *Id.* at 2547.

"If there is a bedrock principle underlying the First Amendment, it is that Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster*, 112 S. Ct. at 509; *see also Cohen v. California*, 403 U.S. 15 (1971).[8] Selective exclusion from a public forum may not be based on content alone, and may not be justified by reference to content alone. *See Carey v. Brown*, 447 U.S. 455, 462-463; *Police Dept. of the City of Chicago v. Mosley*, 408 U.S. 92, 96 (1972); *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 112 S. Ct. at 508. Content-based regulations of speech constitute "censorship in a most odious form" and violates the First Amendment. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J. concurring). Education is the proper and preferable alternative

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[8] *Cohen* involved the wearing of a shirt in a public forum with the words "Fuck the Draft." In overturning a criminal conviction based upon a breach of the peace for the wearing of the shirt, this Court noted that the State acted as it did in order to protect the sensitive from otherwise unavoidable exposure to a crude form of protest. "Of course, the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. While this Court has recognized that government may properly act in many situations to prohibit intrusion into the privacy of the home of unwelcome views and ideas which cannot be totally banned from the public dialogue, we have at the same time consistently stressed that we are often captives outside the sanctuary of the home and subject to objectionable speech." *Cohen*, 403 U.S. at 21.

to censorship. *Whitney v. California*, 274 U.S. 357 (1927).

> But, above all else, the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principles that debate on public issues should be uninhibited, robust and wide open."

Mosley, 408 U.S. at 95-96 (citations omitted).[9]

Petitioners agree that Capitol Square is a public forum. P.C. 3, 18; P.R.B. 1, 2. As such, speech within Capitol Square must be afforded the protections of the First Amendment. Nonetheless, Petitioners wish to differentiate displays from the speeches and gatherings the State has traditionally allowed at this public forum. P.C. 5, 10, 11, 15, 16, 21; P.R.B. 3. Nowhere do Petitioners' argue that religious speech in the form of religious worship, celebrations, speeches, or ceremonies must be excluded from Capitol Square. In fact, Petitioners have allowed such an exercise of religious speech by the Lubavitch sect in celebration of Hanukkah in Capitol Square during previous years. R.B. A14. On those occasions the State did not claim that there had been a violation of the Establishment Clause by allowing an unattended Menorah (P.C. 5, 14, A16, A30; P.R.B. 3, 6.) or the religious celebration of Hanukkah on Capitol Square even though the Governor dedicated the Menorah in 1993 in an open ceremony. R.B. A23. Nonetheless, Petitioners make the fictitious differentiation among displays and religious worship or celebration.

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[9] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 112 S. Ct. at 508.

P.C. 5, 14, A16, A30; P.R.B. 3, 6.[10]

Display of the Klan's cross and its disclaimer constitute religious/political speech protected under the First Amendment. Assuming, *arguendo*, that Respondents' display is somehow different from religious worship or celebration it does not follow that the cross deserves less protection. Though the government generally has a freer hand in restricting expressive conduct, it may not proscribe particular conduct because it has expressive elements. *See, e.g., Johnson*, 491 U.S. at 406; *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968). This Court has acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendment." *Spence v. Washington*, 418 U.S. 405, 409 (1974). Conduct is protected under the First Amendment if it conveys a particularized message. *See id.*; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 505 (1969) (Court recognized the expressive nature of students wearing black arm bands to protest American military involvement in Viet Nam); *Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966) (Court recognized expressive conduct of a sit-in by blacks in a "white only" section to protest segregation).

Like the flag in *Texas v. Johnson*, the cross is a form of utterance. *See Johnson*, 491 U.S. at 405. "Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 632 (1943) (Forced salute of the flag was forced expression). The cross

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[10] Petitioners state "[t]hat distinction, though perhaps obvious enough in the context of particular visible speakers, lacks the same clarity when one considers an unattended display that does not itself articulate the nature of its connection to the government except by its contents and its location, especially when it is located at the very seat of government." P.B. 16.

in this case is pregnant with expressive content. The cross not only embodies significance to religious belief but it also embodies a political message due to the accompanying sign which read (1) "cross was erected by private individuals," (2) "without government support," (3) "for the purpose of expressing respect for the holiday season," (4) "to assert the right of all religious views to be expressed on an equal basis on public property." P.C. A15; P.R.B. 5; R.B. 8, A15, A16. Therefore, the expressive and overtly political and religious nature of this display was both intentional and overwhelmingly apparent. *See Spence*, 418 U.S. at 409; *Tinker*, 393 U.S. at 505; *Brown*, 383 U.S. at 141-142.

A ban on religious expression in a public forum, even if limited to a ban on expression through signs and symbols, would lead to impossible difficulties as indicated by various lower court decisions. *See, e.g., Americans United for Separation of Church and State*, 980 F.2d at 1552. Such a ban would have to extend to anti-religious expression as well.[11] *See id.* at 1552-1553; *see also Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985). Petitioners cite *Gonzales v. North Township*, for the proposition that the cross "does not bear secular trappings sufficient to neutralize its religious message." P.B 22 (quoting *Gonzales*, 4 F.3d 1412 (7th Cir. 1993) (Crucifix had been donated to the city, and thus had become city property)). Petitioners fail to recognize that private religious speech in a traditional public forum cannot violate the Establishment Clause because it does not even implicate the Clause. *See Widmar*, 454 U.S. at 271-72.

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[11] For example, under Petitioners' arguments, a cross, and specifically a Latin cross by itself, could be banned, but a cross with a Red Ribbon, which is the symbol of AIDS awareness, may not be banned. Also, as stated in *Americans United for Separation of Church and State*, "a banner reading 'Cure AIDS, smash the Catholic Church' would be banned, while one reading 'Cure AIDS, support research' could not be banned." 980 F.2d at 1552-1553. The Klan's cross would be banned, but a burning cross would not be banned because of its overtly political message similar to burning the flag in *Texas v. Johnson*, 491 U.S. at 406.

Petitioners' proposition, if nothing else, demonstrates that the state's action was content-based. The State would prohibit religious symbolic speech because it cannot "neutralize its **religious message**." P.C. 22 (emphasis added). The State desires to prohibit only one class of speech -- religious speech. P.C. 22; *see also*, P.C. 3, 5 n.1, 6, 9, 14, 16, 17, A30. Petitioners' argument requires "sanitation" of religious speech, which is an euphemism for censorship. P.C. 22. The Establishment Clause cannot place such a heavy burden on free speech.

2. Allowing one brand of religious speech but prohibiting another brand of religious speech is a viewpoint-based restriction.

"[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includable subject." *Cornelius v. NAACP Legal Defense and Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985). The principle that has emerged from this Court's decisions is "that the First Amendment **forbids** the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) (emphasis added); *Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141, 2147-2148 (1993) (Permitting discussions on family issues, but prohibiting religious discussions of family issues is viewpoint restriction). Like *Lamb's Chapel*, the State engaged in view point discrimination when it allowed Capitol Square to be used as a public forum for the presentation of all views about politics and religion except the Klan's views. *See* P.C. 4, 5, 14, A2, A14, A30; *see also, Lamb's Chapel*, 113 S. Ct. at 2147-2148.

The State engaged in viewpoint discrimination when it allowed the religious speech of a minority religious group, the Lubavitch sect, but excluded the religious/political speech of the Klan. P.C. 14, A30; P.R.B. 10; R.B. 4, 8. The State contends that the Klan's cross would give the impression of government sponsorship. P.C. 14, 19, 24; P.R.B. 10, 8. The cross had a

disclaimer (P.C. A15; P.R.B. 5; R.B. A15, A16), and was never alone in Capitol Square (P.C. 5, A15, A30, A31; R.B. 5, 15, A23, A24, A25, A31, A32). The State made a point in disclaiming its support of the cross (R.B. A12, A14, A15), and had previously condemned the Klan's cross. R.B. A12, A14, A15. At the same time, the State allowed an unattended Menorah without a disclaimer (P.C. A30; R.B. A23) which Menorah had been dedicated by the Governor in 1993 as part of a Hanukkah celebration. R.B. 15, A23. These facts indicate that the motive behind the State's ban of the cross was to exclude the religious/political and highly controversial views of the Klan. R.B. A11 (Senator Finan on a broadcast by Ohio Public Radio stated that "[w]e would love to have a basis for denying the Klan the right to come here"), A17. The State was aware of the Klan's previous attempts in Cincinnati to erect a cross after a menorah had been displayed. R.B. 5, A12, A13, A17, A22.[12] In fact, a closer look into the original banning of all seasonal displays reveals the State's intent was to prevent the Klan from erecting the cross. R.B. 5, A12, A13, A17, A22.[13] After the public's disapproval of the total ban of seasonal displays, the State gave in and allowed those displays which had popular approval. R.B. 5, A14, A20.

Petitioners contend that Respondents' openly acknowledged purpose -- to erect "a symbol for our Lord, Jesus Christ" in furtherance of their more general purpose to "establish a Christian

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[12] "Senator Finan said he wanted to avoid having Columbus go through what Cincinnati went through last year and may go through again this year. Last holiday season, after a tree and menorah were put up in a public square in the queen city, the Klan went to court for a ruling to allow them to erect a 15-foot tall cross . . . Senator Finan stated this year no holiday symbols will be allowed at the Statehouse, and, that way, the Klan won't get its symbol in the door either." R.B. A12 (emphasis added).

[13] State Senator Richard Finan stated: "We could keep the Ku Klux Klan off the Statehouse grounds, all we have to do is bar everybody else. We are not prepared to do that. It's a little easier to bar a holiday tree than it is to bar everybody from the Statehouse." R.B. A13.

government in America" -- is somehow evidence of why the Klan's display must not be allowed. P.C. 4; P.R.B. 5. If anything, the State's hostility toward the Klan's purpose demonstrates that the prohibition of the Klan's brand of religious/political speech was a viewpoint-based restriction. The State's actions are a paramount example of unconstitutional restrictions on speech and expressive conduct because of disapproval of the ideas expressed. *See Lamb's Chapel*, 113 S. Ct. at 2147-2148; *Taxpayers for Vincent*, 466 U.S. at 804.

II.

SELECTIVE EXCLUSION OF RELIGIOUS SPEECH FROM A TRADITIONAL PUBLIC FORUM VIOLATES THE ESTABLISHMENT CLAUSE.

A. Allowing The Private Display Of A Jewish Menorah While Flatly Banning The Private Display Of A Klan Cross Violates The Establishment Clause.

Through an extensive line of cases, this Court has interpreted the Establishment Clause to mean that "government may not promote or affiliate itself with any religious doctrine or organization." *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Public school's curriculum may not be based on a desire to promote religious beliefs); *Stone v. Graham*, 449 U.S. 39 (1980); *Abington School District v. Schempp*, 374 U.S. 203 (1963); *see also Engel v. Vitale*, 370 U.S. 421; 82 S. Ct. 1261 (1962). The government may not discriminate among persons on the basis of their religious beliefs and practices. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (Statute that conditions the holding of public office on a belief in the existence of God is unconstitutional); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-710, and n.9 (1985) (Statute granting an employee a right not to work on his Sabbath unconstitutional); *Larson v. Valente*, 456 U.S. 228 (1982) (Statute that imposed registration and reporting requirements upon only those religious organizations that solicit more than 50% of their funds from

nonmembers is unconstitutional). Moreover, the government may not delegate governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs. *See, e.g., Board of Education of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2488, 2494 (1994); *Aguilar v. Felton*, 473 U.S. 402, 409 (1985); *Wolman v. Walter*, 433 U.S. 229, 254 (1977); *Meek v. Pittenger*, 421 U.S. 349, 370 (1975); *Lemon v. Kurtzman*, 403 U.S. 602, 619-622 (1971).

Government cannot pick and choose among religious beliefs. Preference for particular religious beliefs constitutes an endorsement of religion, and thus a violation of the Establishment Clause. *See County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 593 (1989); *Edwards*, 482 U.S. at 593; *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987). "The fullest realization of true religious liberty requires that government . . . effect no favoritism among sects or between religion and nonreligion." *Abington School District*, 374 U.S. at 305 (Goldberg, J., concurring).

Here, like *Kiryas Joel*, 114 S. Ct. at 2492, the benefits flow to one single sect, Lubavitch. *See* R.B. 4. Aiding this "single, small religious group causes no less constitutional problem than would follow from aiding a sect with more members or religion as a whole." *Kiryas Joel*, 114 S. Ct. at 2492; *see Larson*, 456 U.S. at 244-246. The State's ban of the Klan's cross because it is "a strictly religious, indeed sectarian, symbol," (P.C. 3, 5 n.1, 6, 9, 16, 17) but allowing a Jewish Menorah with no disclaimer, by the Lubavitch sect, gives preferential treatment to one religion over another in violation of the Establishment Clause. *See County of Allegheny*, 109 S. Ct. at 3101; *Edwards*, 482 U.S. at 593. The State's actions give the improper appearance of endorsement to the Jewish Faith and nonendorsement, even hostility, toward Klan Christianity. *See Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring); *Lemon*, 403 U.S. at 612. The State's ban on the Klan's cross conveys a message to Klan Christians that they are not full members of the political community; that they can display their crosses in their property and inside their temples, but

not in a public forum like other sects do. Petitioners' accommodation to the Lubavitch sect singles out a particular religious sect for special treatment. However, "whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored." *Kiryas Joel*, 114 S. Ct. at 2493 (citations ommitted); *Larson*, 456 U.S. at 244-246. The State's actions send the message that anyone will be allowed to erect displays in Capitol Square, except Klan Christians trying to display "religious symbols."

B. Allowing Secular Speech In A Traditional Public Forum While Selectively Excluding Religious Speech Violates The Establishment Clause.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, **religion**, or other matters of opinion or for citizens who confess by word or act or faith herein." *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added). "The Establishment Clause, properly understood, is a shield against any attempt by the government to inhibit religion" as it has done here by allowing secular but not religious speech. P.C. 3, 4, 5, 18, A16, A30; *see McDaniel*, 435 at 641 (Brennan, J., concurring); *Abington School Dist.*, 74 U.S. at 222. The Establishment Clause may not be used as a sword to justify repression of religion or its adherents from any aspect of public life, including the free exercise of their religious belief in public. *See McDaniel*, 435 U.S. at 641 (Brennan, J., concurring).

This Court in *Lemon v. Kurtzman* prescribed the following three-prong test in determining whether a policy violates the Establishment Clause: (1) it must have a secular purpose; (2) its principal or primary effect would be neither to advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. 403 U.S. at 612-613; *see also Widmar*, 454 U.S. at 271. In *Widmar* this Court found that an "equal access" policy meets the first and third parts of the test, and that any advancement of religion would not be the forum's "primary effect"

under the second prong. 454 U.S. at 271-275. Private religious speech in a traditional public forum does not implicate the Establishment Clause. *See id.* To exclude religious speech from a public forum offends the *Lemon* test. *See Widmar*, 454 U.S. at 271.

This Court has never before held that "the Government may ensure that a symbol be used to express only one view of that symbol or its referents." *Texas v. Johnson*, 491 U.S. at 417. Indeed, in *Schacht v. United States*, this Court invalidated a federal statute that permitted a member of one of the armed forces to wear the uniform of that armed force so long as the portrayal does not discredit that armed force. 398 U.S. 60, 65 (1970). Like the government in *Schacht*, Capitol Square cannot adopt a "preference for the dissemination of religious ideas." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 17 (1989).[14] The same analysis applies to the cross. Courts cannot engage in speculation as to when a cross exclusively embodies a religious message, especially when the speech is private speech. This case, like *Widmar*, demonstrates the need for the courts and the State not to enforce laws or decisions which purpose is to exclude "religious worship" and "religious speech." In order to implement such exclusion the courts would have to engage in minuscule analysis as to the trendiness and meaning of symbols used by various religious or nonreligious organizations, thus risking greater "entanglement." *See Widmar*, 454 U.S. at 277-78. Like the University in *Widmar*, courts would first need to determine which words, symbols and activities fall within religious speech or worship. This in fact will prove to be "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." *Widmar*, 454 U.S. at 275 n.11; (*quoting O'Hair v. Andrus*, 613 F.2d 931, 936 (D.C. Cir. 1979)).

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[14] "A statutory preference for the dissemination of religious ideas offends our most basic understanding of what the Establishment Clause is all about and hence is constitutionally intolerable." *Texas Monthly*, 489 U.S. at 28. (Blackmum, J., concurring).

The cross embodies religious, political and cultural significance. R.B. 8; *see also* Appendix A. For example, the cross was once a mechanism to punish crime in the form of a death sentence.[15] If individuals today decided to wear an electric chair around their neck instead of a cross because their sectarian leader was sentenced to death, would that then make the electric chair a religious symbol? Petitioners claim that the Latin cross is known as a predominantly religious symbol. P.C. 3, 5 n.1, 6, 9, 16, 17. If the test is whether a symbol is known for being predominantly religious, the religions which are popular and well known and use the Latin cross as their symbol would suffer discrimination as opposed to those which use the Greek cross[16] or the swastika, which are not well known for their religious significance. *See* Appendix A13, A14, A16.

Moreover, the problem with isolating symbols and conveying on them a particularized message is that the message changes according to the beholder. Most individuals would not be able to distinguish among the four hundred forms of the cross.

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[15] The earliest mode of crucifixion seems to have been by impalation, the transfixion of the body lengthwise and crosswise by sharpened stakes, a mode of punishment still well known among the Mongol race. "The usual mode of crucifixion was familiar to the Greeks, the Romans, the Egyptians, Persians and Babylonians. . . . Alexander the Great executed two thousand Tyrian captives in this way, after the fall of the city." Aaron-Golan, *The Illustrated Bible Dictionary* 342-344 (1981) (hereinafter "*Illustrated Bible Dictionary*"). "Crucifixion was practiced by the Phoenicians and Carthaginians and later used extensively by the Romans. Only slaves, provincials and the lowest types of criminals were crucified, but rarely Roman citizens." *The International Standard Encyclopedia* 761 (1939).

[16] The Greek Cross has four arms of equal length. The Red Cross organization makes abundant use of this form of the cross which has been used for centuries in Christian art. "When five Greek crosses appear on the top of an altar, under the fair linen, reference is made to the five wounds of our Lord's crucifixion." Friedrich Rest, *Our Christian Symbols* 19 (1954); *see* Appendix A16.

F.R. Webber, *Church Symbolism* 99-132 (1971). Most viewers would not know that only fifty of those four hundred variations have been used in Christian symbolism. *Id.* In fact, most people would not be able to distinguish a Latin Cross[17] from a Passion Cross,[18] or a Cruz Ansata.[19] *Id.* In fact, many viewers may not recognize a cross if they saw it,[20] or know whether it is a Christian or non-Christian symbol?[21] To label the cross as an exclusive Christian symbol fails to take into account the non-Christian usage of the cross and the definition of the cross. The cross is a sign formed by

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[17] "This form of the cross is appropriate the world over, and may be used by any religious body whose doctrines include the confession of the Lord Jesus Christ and His atoning death." *Church Symbolism* at 99-132; Appendix A1.

[18] "This is a cross whose ends are cut to points. It is also known as the Cross Urdee, and the Cross Champain, sometimes as the Cross Pointed. It represents the sufferings of our Lord, and has been called by some authorities the Cross of Suffering." *Church Symbolism* 109; Appendix A2.

[19] "A cross, supposedly of ancient Egyptian origin. It may be either a Tau cross with a loop above it, or a Latin cross similarly looped. A symbol of life." *Church Symbolism* 111; Appendix A2.

[20] There are about four hundred forms of the cross. Some include the Anchored Cross. This type of cross originated in primitive days in the catacombs, formed by combining an anchor and a cross. This is a symbol of Christian hope. It is also an heraldic cross whose ends are curved outward like the flukes of an anchor. This type of cross resembles more an anchor than a Latin cross; nonetheless, it is still a cross pregnant with religious symbolism. *See Church Symbolism* 99, 110-111; Appendix A5, A8.

[21] The Crux Ansata is also what is known as an Ankh. The origins of this cross precede the crucifixion of Christ. It is customarily placed in a god's or goddess's hand, and is found in temples, tombs, and in old Egyptian inscriptions. *See* Adams, *The Encyclopedia of Religion* 155 (1987) (hereinafter "*The Encyclopedia of Religion*"); Appendix A5, A8.

the meeting of two lines in the center with four directions apart. "The cruciform sign is used in artistic and scientific expression -- in mathematics, architecture, geography and cosmology. It also occupies an important position in culture in a more general sense and, specially, in religion." *The Encyclopedia of Religion* 155-165. "The sign of the cross was well known in the symbolics of various ancient nations. It represents a combination of opposites. The positive (or vertical) with the negative (or horizontal), life with death, the spiritual (vertical) with the worldly (horizontal)." Gertrude Grace Sill, *A Handbook of Symbols and Christian Art* 30-33 (1975) (hereinafter "*Handbook of Symbols*").

For example, among the Egyptians the cross is said to have been a symbol of divinity and eternal life, and to have been found in the temple of Serapis. *The Encyclopedia of Religion* 155-165. Another example is the gammadion. The gammadion is a Greek cross with its ends bent at right angles; four gammas attached to a common base, all pointing either clockwise, to the right, or counterclockwise, to the left. In India it is an ancient solar symbol and is the emblem of the god, Visnu, representing the cosmic wheel spinning on an axis. *Id.* The cross has also been found in the ancient civilizations of Peru. These civilizations have left valuable information on the role of the cross in solar cults. *Id.* "At the time of the conquest of Mexico, the Spaniards discovered many figurations of the cross in temples and manuscripts. For the ancient Mexicans, the world was built on the cross -- the crossroads joining east to west and south to north. Thus, the cross becomes a symbol of world unity." *Id.*

The meaning of the cross and the symbolism it embodies changes according to the observer. For example, among the occult and witchcraft, crosses are seen as the "oldest AMULETS in the world, predating Christianity by many centuries." Rosemary Ellen Guiley, *The Encyclopedia of Witches and Witchcraft* 74-75 (1989).

> In the commonest form of a cross, all four arms are of equal length rather than a T shape. Crosses have been associated with some deities and heavens, and

> in ancient times they may have represented divine protection and prosperity. . . . Even before the crucifixion of Christ, the cross was a weapon against the dark forces. According to legend, when Lucifer declared war upon God in an attempt to assert his power, his armies scattered God's angels twice. God sent to His angels a Cross of Light on which were inscribed the names of the Trinity. Upon seeing this cross, Lucifer's forces lost strength and were driven into hell.

Id.

Using Petitioners' reasoning, the meaning of symbolism depends on who wishes to erect a display. *See* P.C. 16, 17. If a group of fans of the pop singer Madonna wished to erect a cross in Capitol Square in order to celebrate her concert in the area, would that cross be a religious or a secular symbol?[22] Would the symbolism depend on history and trends? Some courts have upheld the phrase "In God We Trust" on the basis that it has lost its secular meaning, and has become a type of civil religion. *Abington School Dist.*, 374 U.S. at 303 (Brennan, J., concurring) (quoting *McGowan*

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[22] As evidenced by magazines and newspapers, Madonna has influenced not only the music industry, but our culture. In an article from *Tikkun* dated September, 1994, the writer explains how Madonna managed to turn the cross into a symbol of sexy rebelliousness and suburban chic.

> As a result of Madonna's "like a virgin" phase, millions of American girls began to buy and wear large crosses as part of a wannabe ensemble. Stores specializing in punk gear started selling vast numbers of large crosses on chains. The cross may still be a powerful symbol of religious belief--as well as a sometimes signifier of oppression--but its categorical authority as a sign of holiness has been challenged by the irreligious, irresponsible force of the mass market. Smith, Buying Power: Thoughts on the "Crisis" of Commodification. *Tikkun* 63 (Sept. 1994).

v. Maryland, 366 U.S. 420, 442 (1961)); *ACLU v. St. Charles*, 794 F.2d 271 (7th Cir. 1986) ("In God We Trust" and Christmas trees are secular and have lost their original religious meaning). Constitutional law should be based on neutral principles and not on the tides of history, fashion, or theological precepts. The Establishment Clause should not be based upon non-neutral principles changing with time in accordance with popular perception. Using the theory that "In God We Trust" is now constitutional because it has lost its religious meaning means that the same phrase would have at one time been unconstitutional, but is now constitutional. It is intellectually dishonest to state that "In God We Trust" is constitutional because it has lost its religious significance. If we move the words around a little bit and stated "We Trust In God," would that then be unconstitutional if placed above the courthouse steps? Accordingly, if the cross becomes, as it has, a secular icon used by rock stars and fashion designers alike,[23] would that then render the cross a civil religion enabling the government to make use of it? This Court stated that "[t]he suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with

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[23] "Along with this blast from the past comes an interesting trend toward religion as fashion. Crucifixes, crosses, ankhs and other icons have become an irreverent fashion. . . . And let's not forget the fashion influence of rock star Madonna whose recent videos have boosted sales of rosary bead necklaces, faux gem-encrusted crosses and ideological pendants. . . . New Age or Old Testament, Religion Has Become a Fashion Accessory." Edelstein, "Fashion Look of the '90s: Simple Comfortable," *Jewelers Circular Keystone* 128 (August 1989) (hereinafter "Fashion Look of the '90s"). "Sacred imagery is pervading the runways. Does this mean we're losing our religion or desperately trying to find it? Ann Demeulemeestei's fall collection was heaven. Literally. Everything came up rosaries and crosses, and high, detachable collars." Szabo, "Fashion's New Crusade: Sacred Images in Fashion," *Harper's Bazaar* 99 (September 1993). "The cross is the jewelry accessory of choice, strung six across (Donna Karan), draped front and back (Richard Tyler) or worn as a simple necklace (Louis Dell'Olio for Anne Klein)." Schupak, "Fall Fashion Forecast: What's Old is Very New," 164 *Jewelers Circular Keystone* 88 (August 1993).

more specific creeds strikes us as a contradiction that cannot be accepted." *Lee v. Weisman*, 112 S. Ct. 2649, 2657 (1992).

Under Petitioners' theory, the State is forced to determine whether (1) the symbol is religious, and if so, (2) has the symbol become secularized to the point of acceptability. Individuals wishing to use symbols of anti-religious significance would also be banned, creating the same entanglement this Court warned against in *Widmar*. 454 U.S. at 277-278; *see also Kiryas Joel*, 114 S. Ct. 248, 2491 (1994); *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985). In *Kiryas Joel*, this Court stated that an important principle of the Establishment Clause is "that government should not prefer one religion to another, or religion to irreligion." See *Kiryas Joel*, 114 S. Ct. at 2491.[24] A banner representing an atheist organization would also be excluded. In *Widmar*, this Court warned that to draw distinctions between what religious worship is or is not would require the University -- and the courts -- to inquire into the significance of words and practices to different religious faiths, and in various circumstances by the same faith. 454 U.S. at 269-70.[25]

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[24] The State's actions have the primary effect of inhibiting religion because they selectively excluded religious speech. Petitioner's arguments would allow a swastika to be displayed even though the swastika embodies religious significance. *See* Appendix A13-14. Christians, unlike any other religious group, would have to resort to the same tactics early Christians engaged in desguising their crosses. For example, they would have to display an Anchored Cross (*see* Appendix A5, A8) which is sometimes called a Crux Dissimulata. These crosses, like the fish symbol, (*see* Appendix A17, A19) were intended to conceal their true significance from spies and informers who persecuted the early Christians. *See* Stafford, *Christian Symbolism* 68 (1942).

[25] The dissent in *Widmar* argued that "religious worship" was not speech generally protected by the "free speech" guarantee of the First Amendment and "equal protection" clause of the Fourteenth Amendment. The dissent argued that if "religious worship" was protected speech, then the Establishment Clause would be emptied of its meaning. The Court in *Widmar* responded: "Merely to draw the distinction would require the university -- and ultimately the courts -- to inquire into the significance of

Such inquiries entangle the State with religion in a forbidden manner and will have the primary effect of inhibiting religion. *See, e.g., Walz v. Tax Comm'n. of New York City*, 397 U.S. 664, 668 (1970); *see also Widmar*, 454 U.S. at 269-70 n.6.

To adopt Petitioners' arguments would offend the principles embodied in the Establishment Clause. *See Lemon*, 403 U.S. at 612-613; *Widmar*, 454 U.S. at 271; P.C. 3, 16, 18, 24. First, Petitioners fail to provide a secular legislative purpose compatible with the First Amendment. *See Lemon*, 403 U.S. at 612-613; *Widmar*, 454 U.S. at 271. Second, Petitioners' arguments, if followed, would have the primary effect of inhibiting religion. Finally, Petitioners' arguments would foster "an excessive government entanglement with religion." The best way to resolve the issue before this Court is to adopt the reasoning of the lower court: In an open forum religious expression does not implicate the Establishment Clause.

III.

TARGETING THE KLAN CROSS FOR SELECTIVE EXCLUSION FROM A TRADITIONAL PUBLIC FORUM VIOLATES THE FREE EXERCISE CLAUSE.

The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. *Employment Division, Dept. of Human Res. v. Smith*, 494 U.S. 872, 878 (1990).[26] "The First Amendment Religion Clauses mean that

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words and practices to different religious faiths, and in varying circumstances by the same faith. Such inquiries would tend inevitably to entangle the State with religion in a manner forbidden by our cases." 454 U.S. at 269-70.

[26] The government may not compel religious belief; *see Torcaso v. Watkins*, 367 U.S. 488 (1961), punish the expression of religious doctrines believed to be false; *United States v. Ballard*, 322 U.S. 78, 86-88 (1944), impose special disabilities on the basis of religious views or religious

religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference." *Lee v. Weisman*, 112 S. Ct. 2649, 2656-2657 (1992). "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious belief or **regulates or prohibits conduct** because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2226 (1993) (emphasis added).[27] "The Free Exercise Clause protects against governmental hostility which is masked as well as overt." *Id.* at 2227. This Court must survey the circumstances of governmental categories to eliminate, as it were, religious gerrymanders. *Id.* at 2227; *see also, Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. *See Sherbert v. Verner*, 374 U.S. 398 (1963); Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb (hereinafter "RFRA").

There are, of course, many ways of demonstrating that the object or purpose of the law is the suppression of religious conduct. One must begin by examining the text of the law. *Church of the Lukumi*, 113 S. Ct. at 2227. However, the record of the case must also be examined to disclose masked governmental hostility. *See id.*

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status; *see McDaniel v. Paty*, 435 U.S. 618 (1978), or lend its power to one or the other side in controversies over religious authority or dogma; *see Presbyterian Church in U.S. v. Mary Elizabeth Bluehull Memorial Presbyterian Church*, 398 U.S. 440, 445-452 (1969).

[27] *See., e.g., Brounfeld v. Brown*, 366 U.S. 599, 607 (1961); *Fowler v. Rhode Island*, 345 U.S. 67, 68-70 (1953).

Like *Church of the Lukumi*, the facts of this case disclose an object remote from legitimate concerns. *Id.* at 2227-2228; *see also* R.B. A14, A17, A20, A22.

The display of the cross is for the Klan a sincerely-held religious (and political) belief. "What principle of lower logic can be brought to bear to contradict a believer's assertion that a particular act is central to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable 'business of evaluating the relative merits of different religions' claims.'" *Smith*, 494 U.S. at 887 (quoting *United States v. Lee*, 455 U.S. 252, 263 (1982) (Stevens, J., concurring)). "It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith or the validity of particular litigants interpretations of those creeds." *Hernandez v. C.I.R.*, 490 U.S. 680, 699 (1989). Courts must not presume to determine the places or particular belief in a religion or the possibility of a religious claim. *See, e.g., Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 716 (1981); *Presbyterian Church*, 393 U.S. at 450; *Jones v. Wolf*, 443 U.S. 595, 602-606 (1979); *United States v. Ballard*, 322 U.S. 78, 85-87 (1944).

The Klan's purpose in placing a cross with the display was to erect "a symbol for our Lord, Jesus Christ" in furtherance of their more general purpose to "establish a Christian government in America." P.C. 4. The record indicates that the State's purpose in its first ban on all seasonal displays was to exclude the Klan, and the Klan alone, from displaying the cross. R.B. A12, A17, A22. After the ban took place, the government changed its position due to pressure by the community in favor of the menorah and the Christmas tree. R.B. A14, A20. As evidenced by the record, the State's actions were directed at the Klan's free exercise of what it believes to be an essential keystone to its religious belief which it manifests in religious and political speech.

Petitioners are excluding a particular cross which is one of the central symbols of the Klan because it is a religious symbol. In doing so, the State is trying to limit, if not prohibit, the Klan from

freely exercising its religious beliefs in a public forum. One of the Klan's central purposes is to promote Christianity across the United States. P.C. 4. In order for the Klan to accomplish this goal, it has displayed different crosses in different cities across the nation. P.C. 4. Any attempt by the State to deny the Klan's efforts to erect the cross, which is essential to its religious/political beliefs, denies the Klan its Free Exercise protections.

"[B]elief and action cannot be neatly confined in logic tight compartments." *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). "Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause." *Smith*, 494 U.S. at 893 (O'Connor, J., concurring). In the case at hand, because such distinctions cannot be made, there must be at least a presumption that the actions of the Klan in trying to display a cross with a disclaimer which indicated the political and religious purpose of its display must be protected by the Free Exercise Clause. *See Yoder*, 406 U.S. at 220; *Smith*, 494 U.S. at 893 (O'Connor, J., concurring). The First Amendment and RFRA express a mandate requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. *See Hernandez*, 490 U.S. at 699; *Smith*, 494 U.S. at 894-895; RFRA 42 U.S.C. § 2000bb. "[O]nly an especially important governmental interest pursued by narrowly-tailored means can justify exacting a sacrifice of First Amendment freedoms as the prize for an equal share of the rights, benefits, privileges enjoyed by other citizens." *Bowen v. Roy*, 476 U.S. 693, 728 (1986) (O'Connor, J., dissenting).

The State's actions in prohibiting the Klan from freely exercising its religious beliefs[28] shows the State's preference of a

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[28] In *Smith*, this Court suggested that this favoring of minority religions is an "unavoidable consequence" under our system of government and that accommodating of such religions must be left to the political process. In response to such an argument, Justice O'Conner stated that the First

religious minority (Jewish) over the religious majority (Christians), or possibly even one minority (Jewish) over another minority (Klan Christianity).[29] The State's actions disavow its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. For this Court to allow such compromise would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves. *See Lee*, 112 S. Ct. at 2658.

Minorities as well as majorities have the right to freely exercise their First Amendment rights in a public forum. The "[g]overnment may not interfere with efforts to proselyte or worship in public places." *McDaniel*, 435 U.S. at 640 (Brennan, J., concurring); *see also Kunz v. New York*, 340 U.S. 290, 311-313 (1951). The State's actions discriminate against a majority, Christians, and against the Klan who constitute a minority sect within the majority. Many disagree with the Klan's use of religion and Christianity. The Klan is a prime example of those minorities whose views and beliefs must be protected.

> The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property to free

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Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. 494 U.S. at 903. At any rate, the Petitioners' actions are far from neutral or general in application.

[29] If any lesson in history has taught us with regard to the Establishment Clause it is that "in the hands of government what might begin as a tolerant expression of religious views may end in a policy to endoctrinate us. A state-created orthodoxy puts at risk that freedom of belief and conscience which are the sole assurances that religious faith is real, not imposed." *Lee*, 112 S. Ct. at 2658.

> speech, and free press, freedom of worship and assembly, and other fundamental rights may not be substituted to vote; they depend on the outcome of no elections.

Barnette, 319 U.S. at 638.

Bowing to public pressure because of disagreement with the Klan's message is to regulate religious belief and practice to majority vote. The majoritarian approach which the State took in this case is a blatant violation of the First Amendment.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX A

VARIATIONS OF THE CROSS

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[1] *The Graded Cross*: "This is a Latin cross, the vertical member eight to ten squares high and the horizontal member five to seven squares long. It stands up on a base composed of three steps, hence its name. The lowest step represents Charity, the broadest and greatest of the three Theological Virtues, the second step denotes Hope, without which Charity avails little. The highest step is Faith, and is placed next to the cross to express the fact that Faith is the gift of the Crucified Lord, and not a thing of men's own creating. This graded cross, somewhat more slender than the proportions indicated above, is often used upon the altar." Webber, *Church Symbolism* 103 (1971).

[2] *Saint Peter's Cross*: "According to legend, Saint Peter died on an inverted cross. By his request, he was crucified head downward, not considering himself worthy to be crucified in the same position as his Lord." *See* Roch, *Book of Signs* 14 (1955); *see also* Stafford, *Christian Symbolism* 96 (1942).

[3] *The Latin Cross*: "This form of this cross is appropriate the world over, and may be used by any religious body whose doctrines include a confession of the Lord Jesus Christ and His atoning death. It is the actual form of the cross upon which the Savior died, and it is safe to use it almost anywhere. It is not as the Crux Immissa. A cross of satisfactory proportions may be made by cutting twelve perfect squares out of cardboard." The squares will be arranged as follows: "Eight squares high and five squares wide." Anything thicker than that is clumsy. *Church Symbolism* 100-101.

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[4] *Passion Cross*: "This is a cross whose ends are cut to points. It is also know as the Cross Urdée, and the Cross Champain, sometimes has the Cross Pointed. It represents the suffering of our Lord, and has been called by some authorities the Cross of Suffering. It is pictured as rising out of a chalice, it represents our Lord's agony in the Garden Gethsemane. It may be used as a symbol of Good Friday. *Church Symbolism* 108.

[5] *Latin Cross Fimbriated*: Another decorated form of the Latin cross. *Id.* at 130.

[6] *Latin Cross Fleurée*: "Latin cross which all ends terminate in leaf-like ornaments suggesting the fleur-de-lys." *Church Symbolism* 130.

[7] *Crux Ansata or the Cross Ankh*: "A cross, supposedly of ancient Egyptian origin. It might be either a Tau cross with a loop above it, or a Latin cross similarly looped. A symbol of life." *Id.* at 110-111.

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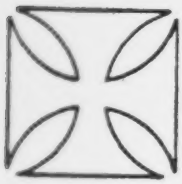

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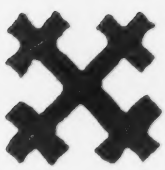
[8] *The Tau Cross*: "This is sometimes called the Old Testament Cross, the Anticipatory Cross, the Cross Commissée, the Egyptian Cross, the Advent Cross, or Saint Anthony's Cross. It is said to be the true form of the cross raised up by Moses in the wilderness. In Roman times it was called the Crux Commissa. It is merely a Latin cross minus its upper arm. In Christian painting, the two thieves are shown hanging up on this type of cross. Saint Anthony and Saint Matthew are both said to have died upon such a cross and it is used as symbols of these two martyrs. In paintings of the Crucifixion, Dismas is shown upon our Lord's right and Gesmas upon his left, both hanging up on Tau crosses. The Tau Cross is the cross of prophecy, and the uplifting of the serpent of Moses is a type of our Lord Jesus Christ. Hence this cross is used upon the violet ultra and pulpit hanging for the Advent season and upon printed matter announcing the special Advent services of the church. It is one of the very oldest ones of the cross." *Id.* at 101, 104.

[9] *Cross Patée*: "One of the most beautiful and most widely used forms of the decorative cross. Its four arms curve outward, and its outer edges are straight. Many variations of this cross exist. If each outer edge is pointed, it is a Cross Patée Fitched. If the outer edges curved outward, it is Cross Patée Convex. If they curved inward, it is called the Cross Patée Concave. If scalloped, it is the Cross Patée Invected. If the sign is within a circle, it is a Cross Alisée Patée. If the design is large, the Cross Patée out to be shown in outline only." *Id.* at 122-123.

[10] *Cross Recercelée*: "Similar to the Cross Moline except that the curved ends are rounded instead of pointed." The Cross Moline is "[a] decorative form of the cross, with arms ending in two petals." *See Church Symbolism* 126.



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[11] *Saint Julian's Cross*: "The Cross Crosslet Saltire is a cross shaped like the letter X. Each arm ends on a Latin Cross. *Church Symbolism* 126-127; *see also* note 30.

[12] *Saint Chad's Cross*: "The Cross Potent Quadrate." *Church Symbolism* 103; *see also* note 40.

[13] *Quarterly Pierced*: "A cross with a square held the full width of the arms, at the intersection of its arms." *Church Symbolism* 124.

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[14] *Cross Barbée*: "A Cross whose ends resemble the barbs of fish hooks or fish spears. Symbolical of ICHTHUS symbol of our Lord. Also suggestive of the idea of 'fisher of men.'" *Church Symbolism* 103.

[15] *Anchored Cross*: "A form of the cross, originating in primitive days in the catacombs, formed by combining an anchor and a cross. The symbol of Christian hope. Also an Heraldic Cross whose ends are curved outward like the flukes of an anchor." *Church Symbolism supra* note 1.

[16] *Cross Wavy*: "An Heraldic Charge, occasionally used in church decoration. Its arms are of a slight undulating character, like conventionalized waves of the sea." *Id.* at 128-129.

[17] *Cross Vair*: "A cross composed of four figures, each one roughly resembling a bell. It derives its name from the Heraldic Fur called Vair." *Id.* at 128-129.

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[18] *Cross Quadrate*: "A cross with a square at the intersection of its arms." *Id.* at 124-125.

[19] *Cross Ragulée*: "A cross with protrusions on its four arms, said to suggest knots and looped-off branches of a tree. A Knotted Cross." *Id.* at 124, 126.

[20] *The Cross Fleury (also spelled Fleurie)*: "A form having four arms of equal or unequal lengths, with pointed petal-like ends." Rest, *Our Christian Symbols* 22 (1959).

[21] *Cross Voided*: "Includes any cross, shown in outline only, so that the color of the field or background shows through it, it is called a Cross Voided." *Church Symbolism* 128-129.

[22] *Greek Cross Fimbriated*: "Another decorative variation of the Greek Cross in which a Greek Cross is superimposed over a bigger voided Greek Cross." *See Church Symbolism* 128; *see also supra* note 6.

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[23] *Symbol for Obscure Species*: Incorrect citation; dagger; death. *See* Dreyfuss, *Symbol Sourcebook: An Authoritative Guide to International Graphic Symbols* 221 (1972).

[24] *Treparted Flurée*: "A cross of three parallel vertical members and three parallel horizontal ones, and with all ends terminating in leaf-like ornaments suggesting the fleur-de-lys." *Church Symbolism* 128-129.

[25] *Cross Chapiteau - The Cross Capital*: "A cross, derived from heraldry, and now used decoratively, whose limbs terminate in architectural form suggesting the capitals of columns." *Id.* at 111, 113.

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[26] *Symbol for the Reception of Cadavers*: This symbol is made by a Latin Cross superimposed over a Greek Cross. *See Symbol Sourcebook* 221.

[27] *Symbol for Injections or Vaccinations*. *Id.*

[28] *Symbol for Pharmacy*. *Id.*

[29] *A, B, C, D, Four Variations of the Ancient Anchor Cross*: "When the top part of an anchor is in the shape of a cross, it is called an Anchor Cross, a symbol of Jesus Christ, our sure Anchor. This cross is carried over from the days of persecution before Constantine, when Christians were able to see Christian hope in the Anchor, while non-Christians saw nothing but an anchor. An anchor is a symbol of hope 'sure and steadfast' (Hebrews 6:19)" Rest, *Our Christian Symbols* 20 (1954).

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[30] *St. Andrew's Cross; or Saltiere*: Saint Andrew is said to have been crucified upon such a cross. Also known as the Crusata, Saint Patrick's Cross and Saint Alban's Cross. Numerous variations of the Cross Saltire exist, such as the Cross Saltire wavy, Cross Saltire Patée, Cross Saltire Invected, Cross Saltire embattled, Cross Potent Saltire, etc. "Upon which St. Andrew suffered a martyr's death. Also called the Crux Decussata. The boundary cross of the Romans, derived from the cross used by them as a barrier. *See Church Symbolism* 104-105, 126-127.

[31] *The Cross of Iona*: The Celtic, or Irish Cross. Which combined the Latin Cross with the circle, the symbol of eternity. This type of cross was first made in Ireland in about the fifth century, by men converted by St. Patrick. They carved great blocks of stone into the bold design of the cross and circle. Fine examples are found on the island of Iona. *See* Fritz, *The Use of Symbolism in Christian Education*. "Some years ago when Protestant bodies were afraid to use a true Latin Cross, due to some fancied association with Rome, many crudely designed Celtic Crosses might have been seen on a church spire. Such crosses were described most aptly by a wag as 'disguised crosses.'" *Church Symbolism* 105-107.

[32] *Six-branched Cross*: this cross can be found in the form of a Latin or Greek Cross. *See* Hangen, *Symbols . . . Our Universal Language* 12 (1962).

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[33] *Cross Botonnée or TreFlée*: Also known as the Cross Bourdonee. "A very beautiful form, either Greek or Latin in design whose ends terminate in trefoils. Once commonly stamped on the covers of hymnals, it is now used widely where a decorative form of the cross is desired. It is often used in cornerstones." *See Church Symbolism* 111-112.

[34] *Easter Orthodox Cross*: "Within recent years, many churches have been erected with a cross on their spires composed of a vertical and two horizontal arms, and a third arm placed in slanting position. Such a cross may be used only by the Eastern Church, and its presence upon a spire or a dome signifies that the congregation is a member of the Eastern Orthodox Church." *Id.* at 105.

[35] *Patriarchal Cross*: "In many paintings, and often in stained glass windows, certain patriarchs are shown carrying a cross with two horizontal arms, the upper one slightly shorter than the lower one. This is known as the Patriarchal Cross. The upper arm represents the head of the Savior when He was crucified." *Id.* at 105, 107.

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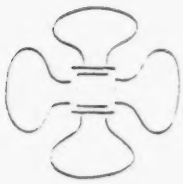
[36] *Papal Cross*: "In a little town in Easter, Pennsylvania, may be seen a church with twin spires, each which is crowned with a cross having three horizontal arms, each a little longer than the other. This is a curious blunder, for such a cross is known as the Papal Cross. It is the cross carried before the Roman pontiff, and may be used by none other, for it is a distinctive mark of his office." *Church Symbolism* 107.

[37] *Cross Lorraine*: "Similar to the Patriarchal Cross, except that the longer bar is near the base. The cross of the Holy League." *Id*. at 121.

[38] This cross, either attached or detached, is found hewn in the stone or painted on the walls of Roman Catholic churches, denotes that they have been consecrated. *See The Book of Signs* 24-27.

[39] *Sixteen Pointed Cross*: A cross whose four ends each terminate in four points, resembling the teeth of a saw." *Church Symbolism* 128.



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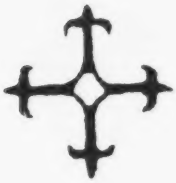

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[40] *The Canterbury Cross*: "A cross with four hammer-like arms which spring from a square." *Church Symbolism* 112.

[41] *Maltese Cross*: "A cross resembling four spear heads with the points touching. The eight outer points of this cross must all be equidistant from one another. It is a well known symbol of the Eight Beatitudes, and is called the Regeneration Cross. Also the symbol of St. John's Day. It was worn by the Knights Hospitallers, ~~or~~ Knights of St. John of Jerusalem. It must not be confused with the Cross Patée." *Id.* at 121-122.

[42] This cross is closely related to the cross voided, or gamadia. It is "the beautiful badge of the German gymnastic clubs: composed of four "F's" standing for, Frisch, Fromm, Frohlich, Frei." (Hardy, godfearing, cheerful and free) *Book of Signs* 19.

[43] *Cross Voided in Center*: Latin or Greek cross in which its center is shown in outline only. *Church Symbolism* 128.

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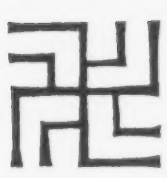
[44] *Cross Potent*: "Also known as the Jerusalem Cross. Four Tau crosses whose lower ends meet. Called Cross Potent because of its resemblance to an ancient crutch. A very fine form, and symbolical of the Savior's power to heal the diseases of men's bodies and souls." *Id.* at 125.

[45] Symbol for "vinegar," "Cross Joint," and "Threaded." *Symbol Sourcebook* 221.

[46] *Cross Cramponée*: "A Cross Potent with a part of each termination missing. Similar to the swastika, except that the return arms are shorter." *Church Symbolism* 115.

[47] *Swastika Cross, Rebated Cross*: The FylFot, or Swastika. A cross of extremely ancient origin, each arm of which is bent at right or left angles. "It is believed by some to have symbolized the four cardinal points of the compass. This form of cross was known to many non-Christian races." *Church Symbolism* 126; *see also*, *Symbols . . . Our Universal Language* 12.



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[48] Elaborated form of the Swastika. *The Book of Signs* 18.

[49] Derived from the sun wheel by breaking the circumference of the circle. Amongst the early Christians, this, as well as many other symbols, including the Swastika Cross, "was used as a disguised cross during the persecution of the Christians. Hence its name Crux dissimulata. It was also called Crux gammata, from the fact of its being made up of four Greek gammas." *The Book of Signs* 18.

[50] *Roman Sacred Cross*. *Id*. at 19.

[51] *Cross Moline*: "A decorative form of the cross, with arms ending in two petals." *Church Symbolism* 122.

[52] *The Cross Millrine*: "A cross whose ends resemble somewhat the clamp on the upper millstone." *Id*.

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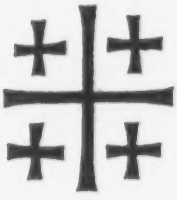

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[53] *Cross Cercellée*. "Somewhat like the Anchored cross, except that its curved ends resemble a ram's horn." *Id.* at 113.

[54] *Cross Pommée*: "A cross whose arms end in single knobs." *Id.* at 124-125.

[55] *Cross Cantonnée*: "Any large cross closely surrounded by four smaller ones of similar design, is called a Cross Cantonnée." *Id.* at 113.

[56] *Cross Patée Fitchée*: Three of its four arms curve outward and its fourth lower arm is drawn out to a sharp point, it is said to be fitched, or pointed. "This form is said to be originated at the time of the Crusaders, when the Crusaders carried small crosses with pointed lower arms, capable of being thrust into the ground at the time of daily devotions." *Id.* at 117-118.

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[57] *Coptic Cross with the Four Nails*. *The Book of Signs* 20.

[58] *Greek Cross; Cross-Channel Fair-way; Left Bank; Red Cross*: *Symbol Sourcebook* 221; *Church Symbolism* 101, 103.

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RELIGIOUS SYMBOLS

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[59] "The third member of the Godhead, the Holy Spirit, has been most often represented by the descending dove mentioned in the Baptism of Jesus (Matthew 3:16-17)." Fritz, *The Use of Symbolism in Christian Education* 26 (1952).

[60] "The Fleur-De-Lys has been used to represent the Trinity." *Id.* at 25.

[61] "Among the earliest symbols . . . were those of identification; marks by which, without danger, Christians might recognize their brothers in the faith. The most familiar of these is ICHTHUS - the fish. In the Greek the first letters of the phrase 'Jesus Christ, Son of God, Savior' formed the word 'fish.' The fish was often in the form of a dolphin." *Id.* at 16.

[62] "The equilateral triangle often appeared in the catacombs as a symbol of this triune God - Father, Son, and Holy Spirit, three in one, equal, eternal." *Id.* at 25.

[63] The trefoil was also used to symbolize the trinity. *Id.*

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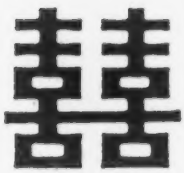

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[64] "A cross divides a section into four parts, and in each part are placed two letters. In the upper left corner are the letters IC, which abbreviate the name Jesus. In the upper right corner are the letters XC, which stand for the name of Christ. In the left corner below the horizontal bar of the cross the letters NI, and in the lower right corner, KA. The letters IC XC NIKA stand for 'Jesus Christ conquers.' Since they are around the cross one may add, 'by the cross.'" *Our Christian Symbols* 7.

[65] Symbol for Hinduism, or Mandala. *Symbol Sourcebook* 221.

[66] Symbol of Confucianism representing conjugal bliss. *Id.* at 138.

[67] Symbol of Christianity. Anchor; St. Clement. *Id.* at 138.

[68] *The Chi Rho Symbol*: An ancient monogram of Christ. *Our Christian Symbols* 6.

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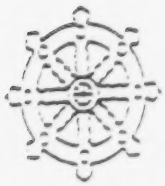

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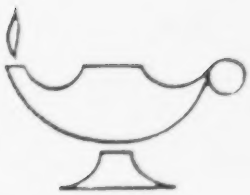
[69] *Christian Symbol, "Triquetra:"* "[A] design consisting of three equal arcs, is also used as a symbol for the Holy Trinity. Its beauty as an architectural design may be seen on some church buildings. Its richness may be noted in that half the length of each pair of arcs forms a *vesica piscis* (bladder of a fish)." *Id.* at 16-17.

[70] Symbol representing the "Wheel of Law" in Buddhism. *Symbol Sourcebook* 138.

[71] Christian Symbol of the Holy Grail inn reference to eternal life. *See The Use of Symbolism in Christian Education* 17.

[72] Christian symbol: Jesus the Lamb of God (John 1:29). *Id.*

[73] Christian Symbol of Identification (supra note 61) used to mark a house in which the Lord's Supper was to be secretly celebrated. *Id.* at 16.



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[74] Christian Symbol in reference to John 8:12, "Again Jesus spoke to them, saying, 'I am the light of the world; he who follows me will not walk in darkness, but will have the light of life.'" *Id.* at 18. Also representing the Bible. *Our Christian Symbols* 28.

[75] Tibetan Buddhist symbol representing "The Path of Universality." *Symbol Sourcebook* 138.

[76] Symbol of Christianity monogram representing Christ. *Our Christian Symbols* 5-6. Also represents the Son of Righteousness. *See* Stafford, *Christian Symbolism* 37 (1942).

[77] Christian Symbol representing the Gethsemane. *Id.* at 62.

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[78] "The eagle denotes the evangelist John. The spirit of the gospel of John, formerly thought to have been written by John the apostle, is like an eagle soaring to the throne of grace." *Our Christian Symbols* 35-36.

Crosses in Government Decoration[79]

United States	Distinguished Service Cross of the Army (square cross circled with the sign of eternity and carrying at its center an eagle); see supra note 58, 78.
	Navy Cross (resembles the Canterbury or consecration cross, squared with rounded ends, and having bundles of light rays, signifying immortality, shooting from the intersection of its arms)[80]
	Distinguished Flying Cross (reminiscent of the Bethlehem cross, is a cross pattee with squared-off bundles of light, carrying on its upper surface a square cross formed by the propellers of an airplane)[81]
Germany	German Iron Cross
	Hitler's Mothers' Cross
England	The cross of the British Champlains' Corps (embodies three crosses, including a Maltese and a round-ended square cross surrounded by the words, "In This Sign Conquer")[82]

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[79] Miller, *A Treasury of the Cross* 17-18 (1956).

[80] *See supra* note 40 and accompanying text.

[81] *See supra* note 9 and accompanying text.

[82] *See supra* note 41 and accompanying text.

British civilian Orders of Knighthood, such as "The Most Noble Order of the Garter" (usually incorporates a cross on their badges)

Crosses in Flags[83]

United States	The Confederate flag (carried the X-shaped St. Andrew's cross)[84]
Great Britain	Union Jack of Great Britain (carries the X-shaped St. Andrew's cross, with the X-shaped St. Patrick's cross-re on white-, as well as a square cross intersecting it)[85]
Norway	Unequal-armed blue cross on a red field.
Greece	Square Greek cross in white against a blue field.[86]
Switzerland	Square white cross, reverse of the Red Cross symbol.[87]
Finland	Incorporates crosses on its merchant flag.
Sweden	Incorporates crosses on its man-of-war flag.

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[83] *Book of Signs* 18-19.

[84] *See supra* note 30 and accompanying text.

[85] *See supra* note 30 and accompanying text.

[86] *See supra* note 58 and accompanying text.

[87] *See supra* note 58 and accompanying text.

Crosses in the Philately[88] of Nations[89]

Italy	1926 & 1929 (crosses are seen among Romulus, Remus, and the wolf of Rome)
	1932 (crosses appear one in conjunction with the dome of St. Peter's, and one circled cross embodying angel wings)[90]
Latvia	1926 & 1929 (Eastern crosses are seen on their stamps)[91]
Lithuania	1926 & 1929 (Eastern crosses are seen on their stamps)[92]
Rumania	1935-36 (Rumania included a Christian cross in her stamp designs)
Portugal	1935-36 (Portugal included a Christian cross in her stamp designs.)
Spain	1930 (Spain issued a dramatic stamp showing a huge-sailed galleon protected by the cross)
New Caledonia	(From time to time issued cross-bearing stamps)
New South Wales	(From time to time issued cross-bearing stamps)

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[88] Philately: "The collection and study of postage stamps and related materials." *The American Heritage Dictionary* 515 (2d ed. 1983).

[89] *Book of Signs* 19-20.

[90] *See supra* note 38 and accompanying text.

[91] *See supra* note 34 and accompanying text.

[92] *See supra* note 34 and accompanying text.

Nicaragua	(From time to time issued cross-bearing stamps)
Peru	(From time to time issued cross-bearing stamps)
Czechoslovakia	1929 (Issued a stamp on which a cross bears witness to the Christian faith of that country)
Greece	1913 & 1922 (During the years of occupation Greece placed crosses on stamps)
Germany	1934 (Germany printed a stamp emblazoned with the swastika, the hooked cross used by Nazism as its symbol)[93]
French Equatorial Africa	1938 (Placed a form of the Christian cross on a stamp)
Belgium	(A valuable Belgium stamp carries a double-barred Lorraine cross on the shield of a horse-mounted Crusader to commemorate the leader of the First crusade, Godfrey de Bouillon, who sold his castle in the valley of the Semolis and left his possessions to follow Christ.)[94]

[93] *See supra* note 46-49 and accompanying text.

[94] *See supra* note 37 and accompanying text.

APPENDIX B

STATEMENTS OF INTEREST OF AMICI CURIAE

Liberty Counsel is a nonprofit civil liberties education and legal defense organization. Liberty Counsel concentrates on providing education and legal defense involving freedom of speech, freedom of religion, and church-state relations.

The issue before this Court has far-reaching ramifications for free speech, free exercise of religion, and the Establishment Clause. Liberty Counsel is concerned that a ruling prohibiting the Klan from displaying their cross in an open forum would have a devastating effect on religious speech. Though not in agreement with the tenets promoted by the KKK, Liberty Counsel believes that the Klan has the right to express its ideas, no matter how abhorrent, as any other group society may deem acceptable.

Supreme Court, U.S.
FILED
MAR 23 1995
OFFICE OF THE CLERK

No. 94-780

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CAPITOL SQUARE AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER and OHIO SENATOR RICHARD T. FINAN,
Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR and KNIGHTS OF THE KU KLUX KLAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF *AMICI CURIAE* KNIGHTS OF COLUMBUS COUNCIL 2961 AND DONALD L. CREATORE IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-780

CAPITOL SQUARE AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF *AMICI CURIAE* KNIGHTS OF COLUMBUS COUNCIL 2961 AND DONALD L. CREATORE IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI*

Amici are Knights of Columbus Council No. 2961, an unincorporated association, and Donald L. Creatore, one of its members. *Amici* have filed a petition for a writ of certiorari in *Knights of Columbus Council No. 2961* v. *Town of Trumbull*, No. 94-1242 (filed Jan. 18, 1995), which is currently pending before this Court and which presents the identical question at issue here. In that case

Trumbull, Connecticut banned *amici*'s private creche from the Town Green pursuant to a new policy, so far applied only to *amici*, that bans private religious displays from the Green, while permitting secular ones. *Amici* thus have a quite concrete interest in the present case.

Moreover, the Knights of Columbus have a long and distingushed record of defending religious liberty. It was, for example, the Knights of Columbus who underwrote the litigation in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). *Amici* file this brief with the consent of all parties.

SUMMARY OF ARGUMENT

Justice O'Connor has recently stressed that "the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Education of Kiryas Joel Village School Dist.* v. *Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

This case illustrates the point well. Both parties seek to import endorsement analysis, which is useful in the government speech context, into a context for which it is ill-suited—private speech in a traditional public forum. This pits the Establishment Clause against the Speech Clause, and damages both in the process.

Amici respectfully suggest that the appropriate Establishment Clause analysis in cases such as this is whether the State's policy for permitting access to the forum is content-neutral with regard to religion. In other words, in public forum cases, the Establishment Clause requires only what the Speech Clause does. This mode of analysis better serves the value of government neutrality that lies at the heart of the Establishment Clause. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 *DePaul L. Rev.* 993 (1990).

And it comports well with the Court's public benefits cases under that Clause.

Such neutrality analysis also leaves intact the Court's settled Speech Clause jurisprudence. By contrast, using endorsement analysis in a private speech case risks upsetting both the prior restraint and public forum doctrines. The ad hoc decisions that government officials would be required to make when faced with permit applications for arguably religious displays would be classic prior restraints that would chill, if not proscribe protected speech.

Case-by-case endorsement analysis of private speech would also undermine this Court's public forum doctrine. It would create an exception based entirely on the mistaken impressions of third parties. Endorsement analysis could spread beyond Establishment Clause cases. For example, apparent endorsement of hate-speech could be claimed to violate the Thirteenth Amendment's prohibition on badges of servitude.

Endorsement analysis for private speech could also create multiple new and specialized tiers of public fora, based on their distance from the seat of government. The result would be the perverse rule that some speech may be banished from the quintessential public forum—the town square—precisely because it *is* the town square.

Respondents' expected argument that religious speech is permissible in a traditional public forum, near to the seat of government, only if the government does not otherwise endorse that speech is misguided. Regardless of whether the government somehow endorses it, private speech in a traditional public forum remains private speech. Perhaps the government's extraneous endorsement could be enjoined. But the private speech itself would still be protected.

ARGUMENT

Justice O'Connor recently wrote that "the Establishment Clause, like the Free Speech Clause, cannot easily be reduced to a single test. There are different categories of Establishment Clause cases, which may call for different approaches." *Board of Education of Kiryas Joel Village School Dist.* v. *Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment). That is because "the same constitutional principle may operate very differently in different contexts." *Id.* Indeed, Justice O'Connor warned, "setting forth a unitary test for a broad set of cases may sometimes do more harm than good." *Id.*

This case proves her point. Both parties' insistence on applying endorsement analysis in a context for which that analysis is not suited—private speech in a traditional public forum—creates a conflict within the First Amendment. The Establishment Clause is said sometimes to forbid what the Speech Clause would otherwise require. This conflict menaces both clauses.

For the reasons set forth below, *amici* respectfully suggest that the appropriate Establishment Clause analysis in cases such as this is whether the State's policy for permitting access to the forum is content-neutral with regard to religion. In other words, in public forum cases, the Establishment Clause requires only what the Speech Clause does. This mode of analysis better serves the value of government neutrality that lies at the heart of the Establishment Clause, while leaving intact the Court's settled Speech Clause jurisprudence. In the present case, this analysis indicates the Court of Appeals' judgment should be affirmed.

I. ENDORSEMENT ANALYSIS, WHILE USEFUL IN GOVERNMENT SPEECH CASES, IS NOT WELL SUITED TO CASES CONCERNING PRIVATE SPEECH IN PUBLIC FORA

There is "a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education of the Westside Community Schools* v. *Mergens*, 496 U.S. 226, 250 (1990). There is, accordingly, a crucial difference in the mode of Establishment Clause analysis appropriate to each. It is a difference this Court has been careful to observe.

In *County of Allegheny* v. *ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989), this Court ruled that a private party could not display a creche on the Grand Staircase inside the Allegheny County courthouse, which was *not* a public forum. Under those circumstances, the creche was sponsored by the goverment. And it was unconstitutional because it did not comply with the standards for government displays set forth in *Lynch* v. *Donnelly*, 465 U.S. 668 (1985).

> The Grand Staircase does not appear to be the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche. Even if the Grand Staircase occasionally was used for displays other than the creche (for example, a display of flags commemorating the 25th anniversary of Israel's independence, *id.* at 176), it remains true that any display located there fairly may be understood to express views that receive the support and endorsement of the government. . . .

Allegheny, 492 U.S. at 600 n.50.

When, as in *Allegheny*, the government sponsors a religious display, the question becomes whether that

sponsorship violates the Establishment Clause. This has proven to be a difficult question, and one in which the Court has found endorsement analysis useful. See *Allegheny*, 492 U.S. at 623-37 (O'Connor, J., concurring in part and concurring in the judgment) (upholding menorah while striking down crèche, employing endorsement analysis); *Lynch* v. *Donnelly*, 465 U.S. 668, 687-94 (O'Connor, J., concurring) (concluding government-sponsored creche constitutional using endorsement analysis). Endorsement analysis is similarly useful in dissecting other types of religious speech by the government or its agents. See *Wallace* v. *Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring).

But, as Justice O'Connor noted in *Kiryas Joel*, one size of analysis does not fit all Establishment Clause cases. Thus, the *Allegheny* Court twice went out of its way to emphasize the government speech/private speech distinction, and the limits of its holding. The Court stressed that "the creche here does not raise the kind of 'public forum' issue, cf. *Widmar* v. *Vincent*, . . . presented by the creche in *McCreary* v. *Stone*. . . ." *Allegheny*, 492 U.S. at 600 n.50 (citations omitted). Later, the Court expanded on that point:

> [N]ot all religious celebrations of Christmas located on government property violate the Establishment Clause. It obviously is not unconstitutional, for example, for a group of parishioners from a local church to go caroling through a city park on any Sunday in Advent or for a Christian club at a public university to sing carols during their Christmas meeting. Cf. *Widmar v. Vincent*, 454 U.S. 263 (1981). The reason is that activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith.

492 U.S. at 612 (footnote omitted). In short, the speech at issue in *Allegheny* was government speech, for which endorsement analysis is a helpful judicial tool, not private speech for which it may not be.

This interpretation is further bolstered by this Court's subsequent involvement with religious-symbol disputes in Pittsburgh. In 1989, after *Allegheny*, a private party applied for permission to place a menorah in front of the Pittsburgh/Allegheny County City-County Building. The City denied the request, and was sued. The district court, citing the public forum doctrine, granted an injunction requiring the city to permit the display, *Chabad* v. *City of Pittsburgh*, CA No. 89-2432 (W.D.Pa. Dec. 21, 1989), but the Third Circuit then stayed the district court's order. No. 89-3792 (3d Cir. Dec. 21, 1989). On emergency application to this Court, Justice Brennan vacated the Third Circuit's stay, thus reinstating the order requiring the city to allow the display. 58 U.S.L.W. 3426 (Dec. 22, 1989). The full Court then declined to vacate Justice Brennan's order. 493 U.S. 1012 (Dec. 28, 1989). See *Americans United for Separation of Church and State* v. *City of Grand Rapids*, 922 F.2d 303, 308-09 (1990) (recounting these events). See also *Board of Trustees* v. *McCreary*, 471 U.S. 83 (1985) (mem.) (affirming, by equally divided Court, decision that Establishment Clause did not bar private creche in public park).

Justice Brennan's stay in *Chabad* was not a novelty. This Court has for more than fifty years repeatedly insisted that public fora are open to private religious expression, however unpopular that expression may be. *Cf. Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (denial of permit to religious group for use of public park violated Equal Protection Clause); *Saia* v. *New York*, 334 U.S. 558 (1948) (reversing conviction of preacher for use of loudspeaker without permit, where permit process lacked governing standards); and *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (reversing conviction of Jehovah's Witness for soliciting donations without a permit and for breaching the peace by playing anti-Catholic recording).

In recent years, the Court has strongly restated the principle that public fora are open to private religious

speech. In so doing, moreover, it has repeatedly rejected the argument that such openness constitutes improper government endorsement of religion. Thus, in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court ruled that a university could not exclude even religious worship from its public facilities. "[A]n open forum in a public university," said the Court, "does not confer any imprimatur of State approval on religious sects or practices." *Id.* at 274. This was true, moreover, even though the university facilities were designated (and not traditional) public fora, and the government could close them to all speech.

In *Mergens, supra*, the Court upheld the constitutionality, under the Establishment Clause, of the Equal Access Act, which guarantees religious student groups certain rights of access to public high school facilities for extracurricular activities. The Court observed that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250.

Most recently, in *Lamb's Chapel* v. *Center Moriches Union Free School District*, 113 S. Ct. 2141 (1993), the Court ruled that a school board had violated the Free Speech Clause by not allowing a church group to use school premises, that were available to other groups, to exhibit a film that included religious themes. Indeed, the Court even assumed, for purposes of argument, that the school premises were a *non*public forum, *id.* at 2146-47, in which government may exclude speech on the basis of content, so long as it does not discriminate on the basis of viewpoint, see *Perry, supra*, 460 U.S. at 46. Yet, in *Lamb's Chapel*, the Court again rejected the argument that allowing private religious speech in a government-owned building would constitute improper endorsement. "Under these circumstances, as in *Widmar*, there would have been no realistic danger that the community would

think that the [School] District was endorsing religion or any particular creed . . . ." 113 S. Ct. at 2148.

A principle emerges from these two lines of cases that deserves explicit recognition by the Court: Endorsement analysis is useful in a fact-intensive inquiry into government religious displays (*Allegheny* and *Lynch*) or government religious speech (*Jaffree*), but not in dealing with challenges to private religious speech in public fora (*Widmar, Mergens*, and *Lamb's Chapel*). In this second line of cases the principal basis for decision has been the forum's neutrality with regard to religion. *Amici* repectfully submit that such neutrality, and nothing more, is what is required by the Establishment Clause in the public forum context.

Such "neutrality analysis" gives full voice to a core value of the Establishment Clause. See Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990).

It also comports well with the analysis in this Court's recent public-benefits cases. This Court has repeatedly held that the Establishment Clause is *not* offended when religious groups receive public benefits, according to neutral criteria, along with a broad range of other groups.

As Justice Brennan wrote in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 14-15 (1989), "[i]nsofar as [a] subsidy is conferred upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end, the fact that religious groups benefit incidentally does not deprive the subsidy of the secular purpose and primary effect mandated by the Establishment Clause." In *Witters* v. *Department of Services*, 474 U.S. 481 (1986), the Court held that aid does not violate the Establishment Clause if it is " 'made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution

benefitted,' and is in no way skewed toward religion." *Id.* at 487-88 (quoting *Committee for Public Education & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 782-83 n.38 (1973)). See also *Board of Education of Kiryas Joel* v. *Grumet*, 114 S. Ct. 2481, 2491 (1994) ("we have frequently relied explicitly on the general availability of any benefit provided religious groups or individuals in turning aside Establishment Clause challenges"); *id.* at 2498 (O'Connor, J., concurring in part and concurring in the judgment) ("Religion Clauses prohibit the government from favoring religion, but they provide no warrant for discriminating *against* religion"); *Zobrest* v. *Catalina Foothills School Dist.*, 113 S. Ct. 2462, 2466 (1993) ("we have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge"); *Lee* v. *Weismann*, 112 S. Ct. 2649, 2678 n.8 (1992) (Souter, J., concurring) (Establishment Clause not offended if "the State has, without singling out religious groups or individuals, extended benefits to them as members of a broad class of beneficiaries defined by clearly secular criteria"); *Mueller* v. *Allen*, 463 U.S. 388 (1983) (upholding tax deduction available to parents of all students, public, private, and parochial, even though a majority of its benefits were enjoyed by parents of parochial school students).

First-come, first-served access to public fora more closely resembles a public benefits program than it does government speech. It therefore would not be surprising if the mode of Establishment Clause analysis proper to public forum cases more closely resembled the neutrality analysis used in public benefit cases than the endorsement analysis used in government speech cases.

In sum, under our proposed neutrality analysis for public forum cases, the Establishment Clause should be construed to require the same thing the Speech Clause does: scrupulous content neutrality by the government,

and nothing more. This type of analysis not only harmonizes well with this Court's other Establishment Clause cases, it also has the significant virtue of preventing a Collision between two different clauses of the same First Amendment.

II. ENDORSEMENT ANALYSIS OF PRIVATE SPEECH WOULD UNSETTLE THIS COURT'S SPEECH CLAUSE JURISPRUDENCE

The sort of case-by-case mode of endorsement analysis that petitioners (and, to some extent, respondents) seek would create great tensions within the First Amendment. It would not only further complicate the Court's already complex Establishment Clause jurisprudence. It would also damage the Court's Speech Clause jurisprudence.

A. Endorsement Analysis Would Disrupt The Prior Restraint Doctrine

Requiring public officials to engage in their own ad-hoc endorsement analyses prior to handing out park permits would do violence to this Court's longstanding prior restraint doctrine. While applications for a creche or menorah display may seem relatively straightforward,[1] other permit applications surely will not. What if a private party (rather than the city of San Jose, California) wants to display a statute of the Aztec god Quetzalcoatl? Is that a religious display that must be banned or fully protected speech about Mexican culture that must be permitted? What of a plaque containing the text of Martin Luther King's "I Have a Dream" address, or Lincoln's Second Inaugural—is it a religious display that must be rejected, or a political display that must be al-

[1] On the other hand, even under *Allegheny*, not all *government* creches are banned—only those whose display, taken in context, suggests "a message of government endorsement," rather than "a message of pluralism and freedom to choose one's own beliefs." 492 U.S. at 634 (O'Connor, J., concurring in part and concurring in the judgment, joined by Brennan and Stevens, J.J.).

lowed? Indeed, what of the Klan cross at issue here, is it religious speech, or political speech? Would it make a difference if it were burning?

The point is not just that these questions may be troublesome. The point is that they are questions that must be answered by some petty government official in charge of handing out permits, on an ad hoc basis, and, most importantly, in advance of the symbol's display.

"It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). Accordingly, any prior restraint on speech "bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963). This is true even for low-value expression, like obscenity, which the First Amendment permits the government to proscribe. See *Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (striking down a Texas nuisance statute that permitted state authorities to enjoin future exhibition of obscene films). "[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, supra*, 420 U.S. at 559. Otherwise, uncertainty about where the line is to be drawn will surely chill, if not actually proscribe, much constitutionally-protected speech.

At a minimum, under *Freedman* v. *Maryland*, 380 U.S. 51 (1965), the following procedural safeguards would have to be observed whenever a government official denied a permit because he or she thought a display would violate the Establishment Clause:

1. "First, the burden of proving that the [display] is unprotected expression must rest on the censor [*i.e.*, the government]." *Id.* at 58.

2. "Second, while the State may require advance submission of all [such displays], in order to proceed

effectively to bar all showings of unprotected [displays], the requirement may not be administered in a manner which would lend an effect of finality to the censor's determination whether a [display] constitutes protected expression. The teaching of our cases is that because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a valid final restraint." *Id.* at 58.

3. "To this end, the exhibitor must be assured, by statute or authoritative judicial construction, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing [the display]. Any restraint imposed in advance of a final judicial determination on the merits must similarly be limited to preservation of the status quo for the shortest fixed period compatible with sound judicial resolution." *Id.* at 58-59.

If the Court adopts a case-by-case endorsement analysis without requiring government officials to comply with the prior restraint doctrine, that doctrine will have been badly undermined. If, on the other hand, the protections against prior restraint *are* to be complied with then the heretofore simple job of granting park permits will suddenly become complex indeed. Neither alternative is necessary if the Court saves endorsement analysis for government speech cases, and employs neutrality analysis for private speech cases.

B. Endorsement Analysis Would Disrupt The Public Forum Doctrine

Case-by-case endorsement analysis of private speech would also damage this Court's public forum doctrine. It would create a new exception based entirely on the mistaken impressions of third parties. And that exception could well expand. It is not obvious that endorsement analysis could be limited to Establishment Clause cases. The Thirteenth Amendment's prohibition on badges of servitude, for example, arguably lim-

its government speech as much as the Establishment Clause does. Under endorsement analysis States may therefore be required to deny permits for private hate-speech near government buildings.

Such a notion would be completely at odds with this Courts' teaching. A great many people were bound to misunderstand this Court's order in *National Socialist Party of America* v. *Skokie*, 432 U.S. 43 (1977) (per curiam) (reversing denial of stay, permitting Nazi parade through neighborhood with many Holocaust survivors), but that did not stop the Court from issuing it. *Cf. FCC* v. *League of Women Voters*, 468 U.S. 364, 407 (1984) (restrictions on editorializing by federally-subsidized public broadcasters held unconstitutional despite Congress's intent "to avoid the appearance of government sponsorship of a particular view or a particular political candidate" (Rehnquist, J., dissenting)); *Doe* v. *Small*, 964 F.2d 611, 630 (7th Cir. 1992) (en banc) (Easterbrook, J., concurring) ("If hecklers cannot silence political speech in a public forum, obtuse observers cannot silence religious speech in a public forum").

Endorsement analysis for private speech could also create new and specialized tiers of public fora. Petitioners would distinguish between fora close to the seat of government, from which religious speech (and, perhaps, hate-speech) may be banned, and those more remote from government where such expression would be permitted. (In addition to further complicating public forum analysis, such a rule would also be perverse. It would hold that some speech may be banished from the quintessential public forum—the town square—precisely because it *is* the town square.)

Respondents, on the other hand, are expected to argue that religious speech is permissible in a traditional public forum, near to the seat of government, but only if the government does not otherwise endorse that speech. This, too, is a curious theory. Regardless of whether the gov-

ernment somehow endorses it, private speech in a traditional public forum remains private speech in a traditional public forum. Perhaps the government's extraneous endorsement would be improper and could be enjoined. But the private speech itself would still be protected. Otherwise, the government would have an implicit and ironic veto over religious speech. It could effectively ban it by publicly embracing it.

In short, endorsement analysis, while valuable in the government-speech category of cases, threatens to "do more harm than good" in the private speech context. *Cf. Board of Education of Kiryas Joel Village School Dist.* v. *Grumet*, 114 S.Ct. 2481, 2499 (1994) (O'Connor, J., concurring in part and concurring in the judgment). Neutrality analysis, on the other hand, creates no tension with the Speech Clause, and melds easily with the Court's other Establishment Clause cases.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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In The

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CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER AND OHIO SENATOR RICHARD T. FINAN,

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v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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STATEMENT OF THE CASE

Amicus adopts the statement of the case set forth in the opinion of the court of appeals (Pet. App. A2-A4).

SUMMARY OF ARGUMENT

Cases involving the interaction of religion and government often present difficult First Amendment issues that divide this Court. But two principles are clear from the Court's decisions. On one hand, under the Establishment Clause, government may not specially promote religion. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573 (1989). On the other hand, individual citizens and private groups have the constitutional right to promote religion themselves – to express and advocate their religious views – on the same terms as citizens of other views. The right to express religious views in public discussion and debate is central to both the Free Speech and Free Exercise Clauses, as this Court has long recognized. *See, e.g., Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (both clauses); *Widmar v. Vincent*, 454 U.S. 263 (1981) (Free Speech); *McDaniel v. Paty*, 435 U.S. 618 (1978) (Free Exercise).[1]

[1] Indeed, many of this Court's seminal decisions protecting freedom of speech involved religious speech, particularly by Jehovah's Witnesses. Moreover, the framers and proponents of the Fourteenth Amendment were deeply concerned with protecting religious speech, such as abolitionists had engaged in, against state action. Amar, Akhil, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1278-80 (1992).

In order for the various provisions of the First Amendment to coexist – to respect freedoms of religious speech and exercise while avoiding government establishments – courts must draw a sharp distinction between speech by government and by private citizens. "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

Under the First Amendment, citizens' speech may not be censored on the ground that its content is religious; when government permits speech reflecting other viewpoints, it is constitutionally forbidden to exclude religious speech. *Widmar, supra; Lamb's Chapel v. Center Moriches School Dist.*, 113 S. Ct. 2141 (1993). This case calls on the Court to reaffirm the protection of citizens' religious speech against content-based discrimination in a public forum. Respondents were prohibited from displaying a cross in Capitol Square (concededly a public forum where numerous groups have spoken) solely because the cross is a religious symbol. Any restrictions on access to a traditional public forum are subject to the strictest scrutiny. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

Petitioners, the state officials, justify their suppression of this religious expression on the ground that some observers might think the state was endorsing the religious message represented by a cross. This is yet another refrain of a tune this Court has heard countless times before, and has rejected each time. When a forum for expression is open to a wide variety of organizations, the

fact that the government holds the forum in trust for the people "does not confer any imprimatur of State approval on religious sects or practices." *Widmar*, 454 U.S. at 274; *see also Lamb's Chapel*, 113 S. Ct. at 2148; *Mergens*, 496 U.S. at 248-49.

The equal access principle fully controls this case. There is no basis for distinguishing an expressive display from the meetings that this Court held are protected in *Widmar*, *Lamb's Chapel*, and *Mergens*. Petitioners argue that some observers who see an unattended religious symbol close to government buildings will conclude that government sponsors or endorses the religious message. But such misperceptions are not reasonable and cannot serve as the basis for content-based suppression of religious speech. Avoiding unreasonable misperceptions does not justify the very real silencing of religious speech. The remedy for misinformed observers is more information, not censorship.

The fear that some observers would perceive a state endorsement of religion is the only ground on which Petitioners defend their exclusion of the cross. That ground applies to any group erecting a religious display. Therefore, it is legally irrelevant to this case that the group displaying the cross is the Ku Klux Klan. The state officials do not claim power here to regulate speech that inflicts harms through racial, gender, or religious bigotry. *Cf. R.A.V. v. City of St. Paul*, 112 S. Ct. 2538 (1992). Moreover, state officials "do not contend that the erection of the cross poses a security risk of any kind" that would justify regulation. Pet. App. A16.

Petitioners' argument for unique disabilities on private religious speech suggests that, ironically, the cross is more problematic to the state of Ohio than is the Klan. Under Petitioners' argument, a racially offensive display by the Klan would be constitutionally protected while the cross would be forbidden. This Court should put an end to such anomalous, discriminatory treatment of religious speech.

ARGUMENT

I. PETITIONERS' EXCLUSION OF RESPONDENTS FROM A TRADITIONAL PUBLIC FORUM CONSTITUTES A *PRIMA FACIE* VIOLATION OF THE FREE SPEECH CLAUSE.

Petitioners and their supporting *amici* understandably de-emphasize the central fact of this case: that the government excluded protected private speech from a traditional public forum based upon its content. By proceeding directly to the supposed justification therefor, they minimize the constitutional gravity of this act of censorship.

Despite this tactic, it simply cannot be avoided that the government in this case barred a message from a space that has "immemorially been held in trust for the use of the public and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Committee for Indus. Orgs.*, 307 U.S. 496, 515 (1939) (Roberts, J., concurring). There is no dispute that Capitol Square is such a public forum: as the court of appeals

found, "[o]ver the years, groups as divergent as the Ku Klux Klan and the United Way have held rallies and sponsored speeches in the square." Pet. App. A6. Access to such arenas to engage in speech is a fundamental right rather than a privilege bestowed by government.[2]

Several of this Court's seminal decisions protecting freedom of speech involved viewpoint discrimination against religious speech in public parks. *See Fowler v. Rhode Island*, 345 U.S. 67, 69-70 (1953) (striking down state's refusal to allow Jehovah's Witnesses to preach in public parks when other groups had been allowed to meet); *Niemotko v. Maryland*, 340 U.S. 268, 272-73 (1951) (same, where other groups including Order of Elks had been permitted to meet). These and other of the Court's precedents do not countenance the glaring imposition upon free speech rights involved in this case. *See, e.g., Hague, supra; Carey v. Brown*, 447 U.S. 455 (1980) (striking down ordinance barring picketing in public forum); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (invalidating city's selective prohibition of certain picketing in public forum). When civil rights demonstrators engaged in political and religious speech and singing at the South Carolina State House, this Court recognized that such

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[2] A more extreme version of Petitioners' devaluation of the right to speak in a public forum is found in the brief *amicus curiae* of the Town of Trumbull, Connecticut and the Connecticut Civil Liberties Union Foundation. This brief (at p. 3) declares that government respect for this right is tantamount to a "cash subsidy." It is indeed a sad day when an affiliate of the American Civil Liberties Union sees no difference between exercising fundamental First Amendment freedoms and receiving government largesse.

peaceful expression "at the site of the State Government" was "an exercise of these basic constitutional rights in their most classic and pristine form."

This Court's decisions have recognized the significance of the Free Speech interests at stake in this case by applying a very stringent standard to content-based restrictions upon private speech in a traditional forum. *See, e.g., International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). These cases impose a heavy burden upon Petitioners to justify their very real abrogation of First Amendment rights. As discussed below, Petitioners' invocation of attenuated Establishment Clause concerns plainly does not justify the content-based total exclusion of religious symbols they propose.

II. THE ESTABLISHMENT CLAUSE DOES NOT JUSTIFY PETITIONERS' VIOLATION OF RESPONDENTS' FIRST AMENDMENT RIGHTS.

A. A Government's Refusal to Censor Protected Private Speech Does Not Even Implicate the Establishment Clause.

The rule adopted by the court of appeals in this case is both simple and correct. Private religious speech in a public forum is just that: *private* speech. It is protected by the Free Speech and Free Exercise Clauses and should never give rise to a reasonable inference of government

sponsorship that would require prohibiting it under the Establishment Clause.[3]

Given that this case undeniably involves private speech, it does not require the Court to determine what sorts of government aid to religion violate the Establishment Clause (is "non-coercive" aid permissible, or is any "endorsement" or approval of religion forbidden).[4] The central point in this case is not what kind of religious speech or action by government is prohibited. It is the

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[3] Petitioners and their *amici* erroneously characterize the lower courts' reliance upon these principles as a *per se* rule. In reality, the court of appeals, for instance, declared that the facts that the " 'display is privately sponsored, and it stands in a traditional public forum are *not automatically determinative*, but recent precedent indicates that they should *carry much more weight* than the details of the display emphasized by the [petitioners].' " 30 F.3d 675, 679, *quoting Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538, 1545 (6th Cir. 1992) (*en banc*) (emphasis added); 844 F. Supp. 1182, 1186-87 (S.D. Ohio 1993).

Instead, it is Petitioners and their *amici* that advocate a *per se* rule, contending that the Establishment Clause forbids "any isolated, unattended display of a purely religious symbol at the seat of government." (Pet. Br. at 12).

[4] To be sure, if the clause prohibits only government "coercion" to practice religion, *see, e.g., Lee v. Weisman*, 112 S. Ct. 2649, 2655 (1992) ("at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion"), *County of Allegheny v. ACLU*, 492 U.S. 573, 659-660 (1989) (Kennedy, J., concurring), then government does not violate it by permitting a private group to erect a display in a forum where numerous other groups are free to speak. *See, e.g., Mergens*, 496 U.S. at 261-262 (Kennedy, J., concurring in the judgment) (voluntary student religious club is not coercive).

fact that there is no religious speech or action by government in the first place: Petitioners' Establishment Clause concerns arise when government merely fails to censor private religious speech.

Thus, the result is no different under the rule that the Establishment Clause requires government to avoid non-coercive "endorsements" of religion (that is, to remain strictly "neutral" toward religion): the display still cannot be suppressed. Under the endorsement analysis, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (plurality opinion).

B. This Court's Equal Access Cases Control the Outcome of This Case.

This Court has repeatedly held that the Free Speech Clause guarantees religious groups the right to equal access to expressive fora open to other groups, and that to give such access conveys no message of government endorsement of religion. In *Widmar v. Vincent, supra*, the Court held that a public university could not exclude a student group from meeting in school facilities on the basis of the religious content of the group's discussions, when such facilities were open to other student groups. *Widmar*, 454 U.S. at 267-270, 277. In *Lamb's Chapel v. Center Moriches School Dist., supra*, the Court unanimously held that a religious group could not be denied use of a public school auditorium after school hours when that property

had been opened to a "wide variety of private organizations" to speak on "social or civic" subjects. *Lamb's Chapel*, 113 S. Ct. at 2148. And in *Mergens*, the Court upheld the Equal Access Act, which prohibits public high schools that receive federal funds and have an "open forum" for student clubs to discriminate against any student club on the basis of the religious, political, or other content of its speech. *Mergens*, 496 U.S. 226.

In each of those cases, opponents of equal access trotted out the same arguments they do today: some student or member of the community might see the religious speech on public property and infer that the government promotes or endorses that speech. In each case the Court soundly rejected the argument. In *Widmar*, the Court pointed out that "[u]niversity students are . . . young adults . . . and should be able to appreciate that the University's policy [in maintaining an open forum] is one of neutrality toward religion." 454 U.S. at 274 n.14. In *Mergens*, the Court found that the "proposition that schools do not endorse everything they fail to censor is not complicated," and that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250; *id.* at 261 (Kennedy, J., concurring). And in *Lamb's Chapel*, the Court unanimously held that nondiscriminatory access for religious groups would create "no realistic danger that the community would think that the District was endorsing religion or any particular creed." 113 S. Ct. at 2148.

Indeed, the Court has recognized that to single out displays reflecting religious views for censorship – to

"refuse[ ] to let religious groups use facilities open to others" – "would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 250; *cf. id.* at 261 (Kennedy, J., concurring) (arguing that eliminating religious views "may result in neutrality in name but hostility in fact").

Remarkably, Petitioners themselves seem to concede this important point. They argue that putting a sign on a religious display to disclaim government endorsement (as was done here) is an inadequate compromise because "[t]here is a fine line between nonapproval and disapproval in the minds of many people" and therefore "[a] sign that communicates the government's complete noninvolvement could be interpreted as being hostile to religion." Pet. Br. 48. Common sense would suggest that if people might perceive hostility or disapproval from such a disclaimer, they will almost certainly perceive hostility and disapproval if the government refuses to permit the display altogether.

It is important to note that these broad principles of equal access have been declared in the context of public schools, where "the Court has been particularly vigilant in monitoring compliance with the Establishment Clause" (*Edwards v. Aguillard*, 482 U.S. 578, 583-584 (1987)). If nondiscriminatory access for religious speech creates no reasonable perception of endorsement in the schools, then it even more clearly creates no such endorsement in the context of a public square or park, the "quintessential public forum" (*Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The same is true, in particular, for the grounds of a state capitol. *See Edwards v. South*

Carolina, 372 U.S. 229, 235 (1963) (reversing demonstrators' convictions for breaching the peace by protesting on grounds of state capitol).

C. A Private Display in a Public Park Does Not Violate Any Articulation of the Establishment Clause.

Even if the Establishment Clause applies at all to protected private speech and if this Court's equal access decisions are not deemed controlling, the Establishment Clause nonetheless does not justify Petitioners' suppression of speech. This conclusion is inevitable under any conception of the Establishment Clause.

As *amicus* Christian Legal Society has stated in prior briefs, the primary value underlying the Establishment Clause is government neutrality toward religion.[5] Government action does not violate the Establishment Clause unless it accords religious institutions or activities preferential treatment over nonreligious activities in a way that induces religious exercise. The religion clause "require[s] government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion should be left as wholly to private choice as anything can be." Douglas Laycock, *Formal, Substantive,*

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[5] For a fuller discussion of *amicus* Christian Legal Society's proposed refinement of the Establishment Clause analysis, see its *amicus curiae* briefs in *Rosenberger v. The Rector and Visitors of the University of Virginia*, No. 94-329, pp. 7-8; *Board of Education of the Kiryas Joel Village School District*, No. 93-517, p. 3; and *Zobrest v. Catalina Foothills School District*, No. 92-94, p. 20.

and Disaggregated Neutrality Toward Religion, 39 DePaul L. Rev. 993, 1001-02 (1990).

Putting aside for the moment the Free Speech Clause's prohibition on excluding Respondents from a traditional public forum, the relevant question is whether that exclusion is the more neutral course of action. To ask such a question is to answer it: singling out religious symbols for exclusion clearly is not government neutrality towards religion. Treating a religious message like all other messages plainly does not constitute a preference that induces observers to engage in religious activity. To the extent that displaying a cross in a public park recruits adherents to the Christian faith, such effect is attributable to private speech; the government's failure to suppress that private speech cannot reasonably be deemed the cause of such conversions.

Petitioners and their *amici* implicitly suggest that the "endorsement" test requires a court to ask a different set of questions than those indicated by the neutrality approach. Despite the questionable merit of that suggestion, it remains clear that the Establishment Clause is not violated under Petitioners' conception of the proper test.

The endorsement analysis requires a determination whether a "reasonable" or "objective" observer would view the display as endorsing religion. *See, e.g., County of Allegheny*, 492 U.S. at 620 (Blackmun, J.); *Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring). Just as this "objective observer" must be "acquainted with the Free Exercise Clause and the values it promotes" (*Jaffree*, 472 U.S. at 83 (O'Connor, J., concurring)), so any "objective" or "reasonable" observer must be held to be familiar

with the values underlying the Free Speech Clause. Reasonable observers should realize that the very purpose of a public square or park is for communication and assembly by citizens. In addition, reasonable observers should know the principle that the religious speech of private citizens is protected, and that governments "do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250. Given this knowledge, a reasonable observer should conclude that religious expression among other forms of expression in a public park or square is not the government speaking, but is simply citizens engaging in the time-honored practice of speaking themselves.

Like opponents of equal access in previous decisions, Petitioners and their supporting *amici* try to justify censorship by arguing that this situation is different from all the previous ones. They focus on two features: the unattended nature of the display and its location in front of the state capitol. *See, e.g.*, Pet. Br. 9.

Petitioners offer scant evidentiary support for their implausible claim about what observers will perceive, in large part simply speculating that "everyone" will conclude that government endorsed the religious display.[6] Such misperceptions, even if they would actually occur,

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[6] The only evidentiary support cited in Petitioner's brief is the testimony of a single witness who suggested that one might infer that government supported a United Way display. The witness also testified that "if I had heard that the state did not allow it, that that would indicate a disapproval." (Joint Appendix at 161). Other than one person's speculation about the effect of a different display, Petitioners cite no factual evidence for their naked assumption that "everyone" would perceive a religious display to be publicly sponsored.

are just not "reasonable" and certainly should not justify suppressing speech in a public forum. Petitioners assume that observers will be unaware of many of the facts crucial to determining endorsement. For example, the "observer" that Petitioners posit does not know who has erected and paid for an unattended display, and simply assumes that such a display was erected by the landowner. Pet. Br. 9, 15.[7]

The observer also does not know about the message on the sign attached to the display in this case, which stated that the cross was erected by a private group and was not endorsed by the state. *See* Pet. Br. 46-47 (arguing that disclaimer sign could not be seen from a distance and could not be "understood by children, the non-English speaking, or the illiterate"). This Court long ago held that government cannot "reduce the adult population of Michigan to reading only what is fit for children." *Butler v. Michigan*, 352 U.S. 380, 383 (1957). Neither can Ohio reduce speech at the state capitol to only what will not confuse children and illiterates.

Moreover, the kind of ignorance that Petitioners assume is inconsistent with this Court's decisions, which indicate that the reasonable observer should be held to be

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[7] Comparing a public park to a private citizen's land (which Petitioners do to support their implausible contentions about what a spectator would observe) is totally inappropriate. There is surely a difference between public land that has "immemorially been held in trust for the use of the public," *Hague*, 307 U.S. at 515, and private property. That a third party might infer that a private landowner endorses a message displayed on his property says absolutely nothing about what a third party might infer from a display in a traditional public forum.

familiar with all the facts of the case. If, as Justice O'Connor has said, "the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice" (*County of Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring)),[8] then the "reasonable observer" must know all those circumstances. Thus in *Widmar*, for example, the Court assumed that university students would be aware not only that a large number of student organizations met on campus, but also the less obvious fact that the university had a policy, reflected in its student handbook, that its name "not 'be identified in any way with the aims, policies, programs, products or opinions of any organization or its members.' " *Widmar*, 454 U.S. at 274 n.14 (quoting university handbook). And in *Lamb's Chapel*, the Court assumed that "the community" would know that the church group's meeting "would have been open to the public, not just to church members," as well as that "[t]he District property had repeatedly been used by a wide variety of private organizations." *Lamb's Chapel*, 113 S. Ct. at 2148.

It is ironic, therefore, that Petitioners attack the Sixth Circuit's so-called "per se" approach for "fail[ing] to engage in an evaluation of 'all the relevant facts.' " Pet. Br. 21. It is Petitioners who make selective assumptions about what an observer will and will not know – assumptions all designed to lead to the conclusion that observers will misperceive private speech as government speech.

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[8] Accord *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

Many of the misperceptions Petitioners suggest can easily be dispelled if the reasonable observer makes simple inquiries before assuming that government sponsors a religious display in the public park. The observer can see that there are other, possibly conflicting, symbols elsewhere in the forum (for example, in this case, the menorah that stood near the cross in Capitol Square). The observer can also read any sign (such as the one here) that makes it clear that a display is erected and funded by a private group rather than by the government. Finally, the observer can find out whether a private group erected or paid for the display, whether many other forms of expression have been permitted on the property, and so forth. The remedy for arguably misleading speech is more speech, not censorship; the remedy for misinformed observers is more and better information, not censorship.[9] Otherwise, as Judge Easterbrook has put it, to focus on such misimpressions "create[s] an obtuse observer's veto [over religious speech], parallel to a heckler's veto over unwelcome political speech." *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (en banc) (Easterbrook, J., concurring).

If the kind of misperceptions suggested by Petitioners are legitimate, then there is no basis for the distinction Petitioners try to draw between "live" meetings

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[9] "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). *See, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 87 (1980) (mistaken identification of particular speaker's views with those of property owner remedied by owner's public disclaimer).

and an unattended display. The misimpressions of an "obtuse" observer could also have justified suppressing the live religious meetings that were protected in *Widmar, Mergens,* and *Lamb's Chapel*. One can imagine that some visitor to the school buildings in *Lamb's Chapel*, or to the university campus in *Widmar*, might happen upon a religious group using the facilities and, seeing only that meeting, wrongly jump to the conclusion that it was officially endorsed by the school. Or some uninformed observer passing Capitol Square might see a speaker holding up a Bible at a podium in front of the capitol and wrongly jump to the conclusion that it was the governor delivering a sermon, rather than a local minister.[10]

Petitioners are also highly selective in suggesting facts as to which the "reasonable" observer will be ignorant. The *en banc* Sixth Circuit, in a case where plaintiffs challenged a private group's display of a menorah, has cataloged the methods by which opponents of equal access manipulate the "objective observer" test – methods that Petitioners here also use. *See Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1550 (6th Cir. 1992) (en banc). For example,

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[10] Indeed, as the *en banc* Sixth Circuit has noted in another case, opponents of displays might argue that a display accompanied by an actual service or ritual conveys *more* endorsement than a display standing alone. *Americans United for Separation of Church and State* v. *City of Grand Rapids*, 980 F.2d 1538, 1549 (6th Cir. 1992) (en banc) (holding that unattended private display of menorah in public square need not be suppressed to avoid Establishment Clause violation). The Sixth Circuit opinion in the current case relies heavily on the *en banc* decision in *Americans United*. Pet. A8-A9.

"[t]he plaintiffs' observer does not follow local politics or controversies, or read the newspapers where this issue has been discussed," or else he might read that the government has specifically disclaimed any endorsement of the display; "however, the plaintiffs' observer does go downtown where the menorah can be seen." *Id.* "Further, the plaintiffs' observer must come close enough to realize that there are no persons associated with the menorah" – since (under Petitioners' argument) it is only when the display is unattended that the observer assumes it has been erected by the state. "However, the plaintiffs' observer must not come close enough to read the sign" on the display disclaiming state endorsement, for the sign would dispel any misperceptions. *Id.*[11] As the Sixth Circuit aptly recognized, such manipulation shows why

> the reasonable observer used in the resolution of these cases must be an observer in possession of all the relevant facts. Once it is admitted that the observer is ignorant in some areas, there is no objective means of deciding who gets to make up the components of the observer's knowledge.

Americans United, 980 F.2d at 1550 n.7.

It is not just an abstract exercise to require that the "reasonable" observer be held to inquire about and know

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[11] *Amicus* does not mean to suggest that a disclaimer sign is indispensable to dispel all reasonable perceptions of endorsement. In most cases, there are additional sources (the well-known history of the forum's use, media, other citizens) that provide information such as the private funding of the display and the open nature of the forum. However, a disclaimer on the display should remove even the slightest bit of doubt.

such facts. Incorporating such facts into the analysis is crucial to ensuring that the goal of preventing establishment does not unjustifiably silence religious speech. Pointing to the ignorance of some observers, Petitioners and other opponents of equal access demand a rule to ensure that no one could possibly perceive, even through ignorance or stubbornness, a state endorsement of religion. But such a prophylactic rule guards against *perceived* support for religion by engaging in *actual* suppression of religion. It "demonstrate[s] not neutrality but hostility toward religion" (*Mergens*, 496 U.S. at 248 (O'Connor, J.)). As one scholar has noted:

> [A] solution in which one side bears all of the risk of [citizen] misunderstanding while the other side bears none is not a neutral solution. The risk of misunderstanding must be shared. It is best shared by facially neutral rules in which the government takes no position on religion in its own speech and treats private religious speech exactly like private secular speech. Whatever the risk that some [citizens] will perceive an open forum as an endorsement of groups that participate, that risk is far outweighed by the actual and apparent hostility in a rule that allows [citizens] to talk about anything except religion.

Laycock, Douglas, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 20 (1986).

Indeed, Petitioners and their supporting *amici* explicitly minimize the interests in free religious speech and exercise here. Some *amici* suggest, for example, that "there is no need to place sacred symbols of any faith in

public areas" because "[t]here is abundant private property available for [such public display[s]," such as churches and private homes. Brief of Americans United *et al.* at 2. But it is completely inconsistent with the First Amendment to suggest that a viewpoint may be excluded from a public forum because it could be expressed elsewhere. Like the streets that were the subject of *Schneider v. State*, 308 U.S. 147 (1939), the public parks and squares are "natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163; *see also Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Contrary to the assertions of *amici* (Brief of Americans United *et al.* at 2), the reason religious citizens go to the state capitol grounds to speak is not necessarily to receive "official endorsement." Like many other speakers, they simply want to express their views at a place with a large audience, and to affirm that their views are relevant to and should be considered in public life.[12]

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[12] In any event, the reason why a private speaker chooses the place to speak or to speak at all is irrelevant. Under the endorsement test, the issue is the *government's* intent or effect in acting. *See County of Allegheny*, 492 U.S. at 593 (Establishment Clause " 'precludes *government* from conveying or attempting to convey a message' " of favoritism) (emphasis added) (quoting *Jaffree*, 472 U.S. at 70 (O'Connor, J., concurring)).

D. Petitioners' Novel "Subjective Observer" Theory Would Seriously Damage Both Religious Liberty and the Institutional Integrity of the Judiciary.

Petitioners would impose upon the courts "the obligation . . . to determine the nature of the message being sent *and received*" by Petitioners' "reasonable" observer. (Pet. Br. 9) (emphasis added). As one *amici* describes its position: "[I]t is not necessary that a reasonable observer *would* perceive the governmental action as connoting endorsement or disapproval, for reasonable people will often differ; rather, the government has erred whenever a reasonable person *could* perceive its action as connoting endorsement or disapproval." (Br. *Amici Curiae* Trumbull, Connecticut, *et al.*, 11-12) (original emphasis). Nor does Petitioners' test envision one prototypical reasonable observer; instead *any* reasonable observer's misperception will trigger censorship of private religious speech. In the words of another of Petitioners' *amici*, "it is sufficient, as we will emphasize again, that *a* "reasonable observer" *might* draw the inference, or, indeed, that *some portion* of the reasonable observers in the community *might* so infer." (Br. *Amici Curiae* American Jewish Congress and Anti-Defamation League 4) (emphasis added in part). They would make this case turn on the most foolish and *unreasonable* of "reasonable" observers.

This novel, untested version of the "reasonable observer" that Petitioners and their *amici* press upon this Court is a deeply troubling one for a number of reasons. At bottom, Petitioners urge this Court to substitute a highly *subjective* "reasonable observer" for the *objective* factfinder used as the model reasonable observer by

members of this Court in the past. For Petitioners, a subjective "reasonable" observer's misperception, rather than factual reality, defines the limits of other private citizens' exercise of fundamental rights.

Of course, the immediate question raised by such an overtly relativistic approach to constitutional decision-making is why the allegedly "reasonable" observer's subjective feeling, *i.e.*, that the government is endorsing religious speech when it is not, is any more valid than the next "reasonable" observer's subjective feeling, *i.e.*, that the government is not endorsing religious speech. Merely asking the question reaffirms the commonsense approach in which the reasonable observer is the objective fact-finder – a person presumed to know all of the facts in the situation and to understand the basic constitutional principles that all citizens should know in a pluralistic democracy. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 632 (1989) (O'Connor, J., concurring) (reasonable observer is well informed and evaluates in light of the relevant history and context); *Wallace v. Jaffree*, 472 U.S. 38, 76, 83 (1985) ("objective observer, acquainted with the text, legislative history, and implementation of the statute;" "objective observer . . . is acquainted with Free Exercise Clause and the values it promotes"); *see also, Kreisner v. City of San Diego*, 988 F.2d 883, 892 (9th Cir. 1993); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1390 n.11; *id.*, at 1396 (Anderson, J., concurring).

But Petitioners prefer a reasonable observer who is presumed to be ignorant rather than informed. For example, a touchstone of our constitutional liberties is the basic understanding that the Constitution is a restraint on the government, not on citizens, and that the First

Amendment protects individual expression and activity. But, in order to prevail, Petitioners must collapse the vital distinction between private speech and government speech, a distinction at the heart of the Constitution and numerous decisions of this Court. *See, e.g., Mergens*, 496 U.S. at 250; *Widmar*, 454 U.S. at 271 n.9; *Lamb's Chapel*, 113 S. Ct. at 2148; *McDaniel v. Paty*, 435 U.S. 618 (1978); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Unpredictability is the hallmark of a subjective test. When the reasonable observer is presumed to recognize the distinction between private speech and governmental speech, the religious speaker has a fairly good sense whether his or her speech is permissible in a public location. But the subjective test introduces a "roving censor" into the equation, in the form of the subjective "reasonable" observer. The religious speaker can no longer rely on the *objective fact* that his or her speech is private but must worry whether any passerby might, out of ignorance or malice, claim to misunderstand and attribute his or her speech to the government. The religious speaker, not the uninformed censor, pays for the censor's mistake.

Furthermore, the subjective test greatly increases the likelihood that the censor will not be an uninformed private citizen at all but a government bureaucrat. If this Court were to adopt Petitioners' test, numerous public officials across the country would immediately use the new test to deny religious speakers access to traditional public fora, as well as limited public fora and nonpublic fora. Most of the decisions regarding access for religious speakers to public property are not made by judges but

by local and state officials, some of whom are not predisposed to treat religious persons in a neutral manner. *See, e.g., Church of the Lukumi Babalu Aye v. City of Hialeah*, 113 S. Ct. 2217, 2222 (1993) ("laws in question were enacted by officials who did not understand, failed to perceive, or chose to ignore the fact that their official actions violated the Nation's essential commitment to religious freedom"); *Larson v. Valente*, 456 U.S. 228, 254 (1982) (law "drafted with the explicit intention of including particular denominations and excluding others"); *Fowler*, 345 U.S. at 527 (local officials denied religious group access to park because of hostility toward their particular religious beliefs); *Niemotko*, 340 U.S. at 272-273 (same). The subjective observer test gives any "village tyrants," *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-638 (1943), a virtually unchallengable rationale for denying permits to religious speakers.

Indeed, in the final analysis, the subjective observer test is not a test at all, for it gives no definable standards for determining constitutionality – other than the presuppositions of the government decisionmaker. *Cf. Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance that prohibited conduct that was "annoying to persons passing by" unconstitutionally vague because it subjects First Amendment right to "an unascertainable standard"). For over fifty years, this Court has condemned as unconstitutional a licensing system that places unbridled discretion in the hands of government bureaucrats to determine which religious speakers may or may not speak. *See, e.g., Cantwell v. Connecticut*, 310 U.S. 296, 305-307 (1940). Petitioners' subjective observer theory is a thinly veiled

means of giving government officials arbitrary discretion to discriminate against religious persons.

Nor does such unbridled discretion require that government officials be malicious toward the religious applicant. Many government officials are not intentionally hostile to religion, or to particular religions, but simply wish to avoid any controversy and take the "easy way [by] suppress[ing] private speech." *Hedges v. Wauconda Community School Dist.*, 9 F.3d 1295, 1299 (7th Cir. 1993) (holding unconstitutional school officials' suppression of students' religious speech); *see also, e.g., Lamb's Chapel*, 113 S. Ct. at 2148; *Congregation Lubavitch v. City of Cincinnati*, 997 F.2d 1160 (6th Cir. 1993). Many government officials still mistakenly believe that all religious speech on public property is unconstitutional and view it as their duty to prohibit any religious speech. Unfortunately, public officials are often subconsciously influenced by their own personal religious (or anti-religious) biases. Officials' responses to requests for access may depend on their "comfort with mainstream religious views and discomfort with and perhaps hostility towards non-mainstream, non-traditional religious messages." *Travis v. Owego-Apalachin School Dist.*, 927 F.2d 688, 693 (2d Cir. 1991) (holding unconstitutional local officials' denial of access to evangelical Christian speaker). A primary function of both the Establishment and Free Exercise Clauses is to protect citizens from the religious (or anti-religious) biases of public officials, regardless of whether the officials are acting from malice, aversion to controversy, or unexamined personal predilections.

Both the unpredictability and the potential for abuse of discretion created by Petitioners' new test would have

a dramatic chilling effect on the religious speech of private citizens. Religious citizens must anticipate that each attempt to engage in religious speech in a traditional public forum may result in lengthy, and unpredictable, litigation to determine whether some *unidentified* observer *could* possibly fail to understand that their speech is their own rather than the government's. Nor will the religious citizen be able to respond effectively to the bureaucrat who denies his or her permit to speak in the traditional public forum on the unchallengeable basis that the bureaucrat "just knows" that some unknown person will mistakenly attribute her speech to the government.

Such a chilling effect becomes the quintessential "heckler's veto" warned of by numerous lower courts in recent religious speech cases. Analogizing to the "hecklers' veto," the Sixth Circuit noted below, "We believe that the [defendants'] argument presents a new threat to religious speech in the concept of the 'Ignoramus's Veto.' " 30 F.3d at 679, *quoting Americans United*, 980 F.2d at 1553. Similarly, the Seventh Circuit has seen the parallel between the subjective observer and the forbidden "heckler's veto." *See, e.g., Hedges*, 9 F.3d at 1299-1300. *See also Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383, 1390 n.11 (11th Cir. 1993).

Petitioners' proposed test is not only a disaster for the liberties of religious citizens; it also threatens the efficiency and credibility of the judiciary. First, its inadministrability is apparent. In court, the religious speaker must prove a negative argument that is impossible to prove, *i.e.*, that no person who ever witnesses her expression will mistakenly attribute it to the government. How

is a citizen to prove that proposition? Must the religious speaker depose every member of the community? Does the "reasonable" observer include "children, the non-English speaking, or the illiterate," as Petitioners suggest? (Pet. Br. 46). Given that Petitioners are also concerned about tourists to Capitol Square, the potential field of observers broadens to include the entire world. (Pet. Br. 48).

Similarly, if the burden of proof rests on the government, will the government have proved its case if only *one* witness can be found to testify that she would misperceive the speaker's identity? As already noted, one of Petitioners' *amici* would find an Establishment Clause violation if a single "reasonable" observer would have such a misperception. Or would the government be required to prove that at least 51% of the population (whether of Columbus, Ohio, or the entire world) would misunderstand the source of the speech? What proportion of misperceiving observers is necessary to prove unconstitutionality? Such litigation would be exceedingly lengthy and expensive.

More importantly, the Petitioners' test would reflect adversely upon the integrity of the judiciary itself. The prime function of the courts is to determine and uphold in all cases their best judgment of what the law and the facts actually are. But under Petitioners' obtuse Establishment Clause jurisprudence, the courts would treat as an Establishment Clause violation that which even Petitioners admit would not constitute a true violation of the Establishment Clause. The courts can ill-afford to squander their institutional reputation for integrity by adopting Petitioners' theory. The judiciary comes under enough

attack for enforcing the Establishment Clause in cases in which genuine violations have occurred, without enforcing the Establishment Clause to censor private citizens' religious speech in situations in which all knowledgeable persons understand that a violation of the Establishment Clause has not occurred.

As precedent proves, the only safe harbor for the courts and religious liberty is true neutrality. The model applied for the reasonable observer must be an objective, knowledgeable, logical citizen, who understands the fundamental distinction between private speech and governmental speech – that private religious speech is protected by the First Amendment and governmental religious speech is circumscribed by the First Amendment. The objective observer knows the relevant circumstances of a case and applies logic, rather than subjective feelings, to evaluate those facts. This objective observer understands that the government is treating religion in the neutral manner commanded by the Constitution when it allows private religious speech in a traditional public forum. This reasonable observer understands that the remedy for disagreeable speech is not suppression of the other person's speech but adding her own voice to the public debate.

CONCLUSION

In this case, Petitioners seek this Court's imprimatur on its content-based suppression of private speech in a traditional public forum. They propose that fundamental rights turn on the feelings of hypothetical third party

observers – observers who are ignorant enough to make false assumptions and so uninterested that they do not pursue truth. Protecting this class of ignorant and apathetic hypothetical observers does not justify the actual discriminatory suppression of religious speech. The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

INTEREST OF *AMICUS CURIAE*

Amicus' participation in this case reflects its commitment to freedom for all religious views, and not any sympathy for the views espoused by the Ku Klux Klan. *Amicus*, an organization of Christians in the legal profession, deplores the ways in which the Klan has historically misused the symbols of Christianity to communicate messages of hate and to accompany both threatened and actual violence. We agree with the district court's sentiment (Pet. App. A26) that "[i]t is ironic and in the most literal sense diabolical that [the Klan] would seek to publicly display the symbol of Jesus of Nazareth," whom *amicus'* members regard as the Prince of Peace.

For over a century, the Klan victimized our black brothers and sisters. It would be doubly tragic if their activities today were to cause those same victims, as well as all religious citizens, to lose their right to communicate religious messages in a public forum. As explained in the Introduction to our arguments, *supra*, the issues in this case have no reference to the particular beliefs of the Ku Klux Klan. Petitioners' arguments for censoring the display of the cross apply equally to any unattended religious symbol in a public forum, barring such symbols based on unrealistic fears that the government might be seen as endorsing the religious message because it permits it. Because that argument undercuts the very foundations of free religious speech, this Court must reject it.

The **Christian Legal Society,** founded in 1961, is a nonprofit ecumenical professional association of 4,700

Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* joined by many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of

state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

Supreme Court, U.S.
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No. 94-780

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Capitol Square Review and Advisory Board, Ronald T. Keller, Daniel Shellenbarger, and Ohio Senator Richard T. Finan,
Petitioners,

v.

Vincent J. Pinette, Donnie A. Carr, and Knights of the Ku Klux Klan,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

AMICUS CURIAE BRIEF OF THE FREEDOM FROM RELIGION FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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The Freedom From Religion Foundation, Inc. hereby submits this amicus curiae brief in support of the Petitioner and suggests reversal of the decision below.

I. INTEREST OF AMICUS CURIAE

The Freedom From Religion Foundation, Inc. (hereinafter "Foundation") is a nonprofit corporation organized and existing under the laws of the State of Wisconsin whose mission is to promote the constitutional principle of separation of church and state. The Foundation has approximately 3,500 members nationwide. Membership is open to both religious and non-religious individuals.

The Foundation believes that the religious should be free to practice the religion of their choice and that the non-religious have a right to be free from religion. The Foundation supports the principle of government neutrality on religious matters. It is concerned that the trend to accommodate religion is undercutting this neutrality and that the instant case is, in part, the result of too liberal a policy of accommodation.

II. SUMMARY OF ARGUMENT

The erection of religious monuments on public property, even a public forum, contravenes the Establishment Clause because it forces government to promote religion. When faced with the necessity of choosing between the Establishment Clause, on the one hand, and the Free Speech, Free Exercise Clauses, on the other, the Establishment Clause must prevail. The application of this principle means that public property should not be used for exhibiting religious displays.

If, however, the Court is unwilling to adopt this position, it should, at a minimum, restrict the public forum doctrine to live demonstrations. The Court should not require that public property be used for unattended displays whether such displays be religious or otherwise. That is a decision that should rest with local government.

III. ARGUMENT

In recent years, the Court has significantly expanded the "equal access" doctrine. This principle, long applicable to speech, has been broadened to include religious speech and activity. In effect, the Court has equated the "free exercise" clause with "free speech".

The Foundation submits that the two clauses should have separate and distinct application. The "free speech" clause should not be interpreted to embrace religious speech because, to do so, forces the state to promote religion. There is a fundamental difference between religious freedom and freedom of speech. Religious speech is tempered by the Establishment Clause which is absolute in its command that the state shall not promote or endorse religion. The speech Clause is not subject to this condition. Allowing the speech clause to apply to religious and non-religious speech alike not only renders the religion clause moot, it places the Court in the present dilemma of having to deal with speech, generally, when only religious speech is at issue.

Application of the equal access doctrine to religious speech is exacerbated by the conflict between those who are religious and those who are not. This conflict is so intense that it brings into question the viability of equal access whenever the speech is that of the non-religious minority. This concern is based on real life situations experienced by the Foundation.

In early December of 1992, Christian displays were set up in a public forum in Ottawa, Illinois. The Foundation decided to put up a counter-display in the form of a canvas banner which stated "Jesus Christ is a Myth". The banner was torn down on the first night by a Sunday school teacher. The banner was again put up the next day and was found burned the following morning. A new banner was made, sprayed with fire retardant, and erected with cables which held it twenty or so feet above the ground. Whereupon, an enterprising citizen sprayed the banner with paint so as to obliterate its message.

The next year, Christmas season of 1993, the Foundation erected a new banner. It was cut down overnight, rehung, and cut down again a day later. The Foundation decided to abandon its effort. As a result, the only messages in the park were those advancing and promoting religion. In fact, members of the Foundation have heard the park referred to by the public as "Christian Park".

This experience suggests that the "public forum" doctrine applies in name only and has no real life value to those who wish to display non-religious messages. It has the unintended result of only promoting the message of the religious majority. It is for this reason that the Foundation submits that this Court should modify the public forum doctrine by ruling that it does not apply to speech or other activities which promote religion.

If, however, the Court declines to adopt this position, the Foundation submits that it should at the very least limit the public forum doctrine to live demonstrations. Public property should not be forced to become a repository for unattended displays whether they be religious or otherwise. The public has a right to enjoy its property free from any number of homemade billboards that might be erected by those who have a message to convey. If reasonable controls are not placed on the public forum doctrine, one can visualize, for example, the Vietnam Memorial becoming littered with all sorts of displays destroying the reverential nature of that Memorial. Such a result would be tragic.

IV. CONCLUSION

WHEREFORE, it is suggested that this Court should reverse the decision of the Court below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICI CURIAE OF COUNCIL ON RELIGIOUS FREEDOM, AMERICANS FOR RELIGIOUS LIBERTY, AND THE AMERICAN HUMANIST ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Council on Religious Freedom ("CRF"), a national, nonprofit organization, exits to uphold and promote the constitutionally protected right of religious liberty. Its Board of Directors is composed of individuals active in religious affairs. For almost a decade, CRF has been an advocate of these principles in state and federal courts throughout the country.

CRF files this friend of the court brief because the lower courts' interpretation of the First Amendment permits the Free Speech Clause to devour the Establishment Clause, emptying it of any independent meaning whenever religious activity takes the form of speech in a public forum.

Americans for Religious Liberty ("ARL") is a national, nonprofit public interest educational organization dedicated to defending religious liberty and the constitutional principle of separation of church and state. ARL has been a friend of the court in numerous briefs filed in the United States Supreme Court.

The American Humanist Association ("AHA") is a national educational and philosophical organization founded in 1941. The AHA and its members strongly support the constitutional principle of separation of church and state. The AHA has appeared as a friend of the court in a number of Supreme Court cases.

The parties consented to the filing of this brief in letters of consent submitted to the Clerk of this Court.

SUMMARY OF ARGUMENT

First, the Sixth Circuit's authorization of a religious symbol -- a Latin cross -- on the Ohio State House grounds based upon the First Amendment's Free Speech Clause ignored legitimate Establishment Clause concerns. In so doing, the court allowed the Free Speech Clause to "trump" the Establishment Clause.

Because a site happens to be a public forum, here the center of Ohio State government, does not automatically give the Free Speech Clause final control. Under such circumstances, a compelling state interest analysis must be applied to satisfy the state's legitimate concern that the requirements of the Establishment Clause be satisfied.

A court must look at the nature, size, location, duration, and the religious symbol's relationship to the symbolic center of government. In this context, a Latin cross on the Ohio State House grounds violates the Establishment Clause jurisprudence of this Court. The effect of the Sixth Circuit's decision is to permit the appearance of government endorsement of religion.

Second, the Fourteenth Amendment's Equal Protection Clause does not condone prior violations of the Establishment Clause. Nor do prior violations condone future violations. The remedy is to take corrective action preventing future violations.

ARGUMENT

I. THE COURTS BELOW IMPROPERLY IMPOSED A PER SE RULE THAT THE DISPLAY OF A RELIGIOUS SYMBOL BY A PRIVATE ORGANIZATION IN A PUBLIC FORUM NEVER VIOLATES THE ESTABLISHMENT CLAUSE.

Relying on the Sixth Circuit's decision in *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992) (en banc), the district court concluded the erection of a large unattended Latin cross upon the Ohio Capitol Square during Christmas did not constitute a government endorsement of religion. *Pinette v. Capitol Square Review and Advisory Bd.*, 884 F. Supp. 1182, 1185 (S.D. Ohio 1993). This was premised on the court's understanding of the Sixth Circuit's holding "that where an equal access policy exists, religious speech must be afforded the same privileges as nonreligious speech, the Establishment Clause notwithstanding." *Id.* at 1187. The district court held because "[t]he instant request comes from a private party to erect a religious symbol in what is a traditional public forum," it was unable "to conclude that permitting this display would constitute government endorsement of religion." *Id.*

On appeal, the Sixth Circuit announced "a private organization's unattended display of a religious symbol in a public forum" does not violate the Establishment Clause "provided that there is equal access to the public forum and the display itself is truly private." *Pinette v. Capitol Square Review and Advisory Bd.*, 30 F.3d 675, 676, 679 (6th Cir.

1994).[1] However, the Sixth Circuit did acknowledge where there is a compelling governmental interest, speech in a public forum may be restricted. Regardless, the court concluded "[r]eligious groups may not be selectively denied access to public forums in the name of the Establishment Clause." *Id.* at 680. The court further held "the most fervently devotional and blatantly sectarian speech is protected when it is private speech in a public forum." *Id.*

Such a conclusion runs counter to this Court's prior analyses in similar cases. As Justice O'Connor noted in *County of Allegheny v. ACLU*, 492 U.S. 573, 623 (1989) (O'Connor, J., concurring in part and concurring in the

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[1]Unlike the circuit panel in the instant case, the Sixth Circuit sitting en banc in *Americans United*, 980 F.2d 1538 seemed less inclined to embrace a per se rule observing that Justice O'Connor in *Lynch* had warned the practice must be judged in its unique circumstances and depends on the circumstances and context of a particular practice. *Id.* at 1544. *Americans United* required the Court consider all the facts in each case, *id.* at 1551, but nevertheless held: "truly private religious expression in a truly public forum cannot be seen as an endorsement by a reasonable observer." *Id.* at 1553. Although the court stated "[t]his holding does not mean that an equal access policy in a public forum 'trumps' the Establishment Clause," *id.* at 1553, the court concluded if "the evidence indicates that an area actually is a traditional public forum, then private groups may express a religious message without a reasonable observer inferring public support of the message." *Id.* This led Judge Lively to conclude "[t]he majority would require the Establishment Clause always to yield to, or accommodate the Free Speech Clause as exemplified by the public forum doctrine." *Id.* at 1558 (Lively, J., dissenting).

judgment):

> The *Lynch* Court began its analysis by stating that Establishment Clause cases call for careful line-drawing: "[N]o fixed, *per se* rule can be framed." *Id.*, at 678.

This Court in *Carey v. Brown*, 447 U.S. 455, 461-62 (1980), announced:

> When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.

In *Burson v. Freeman*, 112 S. Ct. 1846, 1859 (1992), Justice Kennedy observed "there is a narrow area in which the First Amendment permits freedom of expression to yield to the extent necessary for the accommodation of another constitutional right." Thus, in *Lamb's Chapel v. Center Moriches Sch. Dist.*, 113 S. Ct. 2141, 2148 (1993), citing its earlier opinion in *Widmar v. Vincent*, 454 U.S. 263, 271 (1981), this Court found "the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' [state interest] justifying an abridgement of free speech otherwise protected by the First Amendment." Instead of taking refuge in a per se determination, the courts must carefully analyze "both the content and the context of speech." *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978).

The facts as they relate to the content and context of the symbolic speech here are crucial to this constitutional

analysis:

(1) In December of 1993, the Capitol Square Review and Advisory Board voted not to permit displays on the Capitol Square during December, 1993. The vote was later declared invalid and on November 23, 1993, the board voted to approve displays of a Christmas tree and a Menorah. *Pinette*, 884 F. Supp. at 1183.

(2) On November 29, 1993, Rabbi Capland applied for permission to erect a Menorah on the Capitol Square from December 8-16, 1993. *Id.*

(3) On November 29, 1993, plaintiff Carr applied on behalf of the Ku Klux Klan for a permit to display a cross on the Capitol Square from December 8-24, 1993. The application described the type of event to be to "erect a cross for Christmas." *Id.*

(4) On December 3, 1993, the board's executive director denied the Klan's requested permit on the grounds the State and Federal Constitutions forbid such activity directing the Klan's attention in particular to controlling decisions recently rendered by the U.S. Supreme Court under the First Amendment. *Id.*

(5) The state displayed its own state Christmas tree on Capitol Square for the past several years (Respondents' Opposition to Pet. at 4). *Id.* at 1184. *See also* Respondents' Opposition to Pet. for Cert. at 6.

(6) The Klan openly acknowledged their purpose in seeking to erect the Latin cross was to display "a symbol of our Lord, Jesus Christ," in furtherance of their more general purpose to "establish a Christian government in America."

(TR. of Dec. 20, 1993, Hearing at 101-02).

(7) Although acknowledging events subsequent to the oral argument appeal hearing had rendered the case moot, *Pinette*, 30 F.3d at 677, the district court nonetheless concluded there was still an actual case or controversy. The injury was of such short duration it made review largely impossible. Further, the injury was likely to recur since "the Klan or *some other organization* [would], in the future, seek access to Capitol Square." *Id.* (emphasis supplied).

Three points are critical. First, Capitol Square was used for both government and private speech. The state erected a state Christmas tree, while the Klan erected their cross. Second, the Klan's cross was not integrated as part of a seasonal display. Third, in refusing to dismiss on mootness, the courts below concluded that in the future some organization (not necessarily the Klan) might seek to erect such a religious symbol.

Since both the state and private organizations used Capitol Square for their respective purposes, the Sixth Circuit's holding that a reasonable observer would know the symbol was private is questionable.[2] The court of appeals concluded "the 'reasonable' observer -- being an individual who is knowledgeable about local events -- might well know

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[2]As Judge Cornelia Kennedy pointed out in her concurring panel opinion in *Americans United* and quoted by Judge Lively in discussing the placement of a Menorah in the public square: "We have here a public forum provided by the government in which some speech, the Calder sculpture, is in some fashion endorsed by the government, and other speech, the menorah, is not readily identifiable as not being endorsed or promulgated by that same government." 980 F.2d at 1557.

by virtue of all of the recent media coverage that the state of Ohio as represented by its leading elected officials opposes the display of the cross and any messages which might reasonably be associated with this display by the Klan." *Pinette*, 844 F. Supp. at 1187. Such an analysis is illogical because under a per se holding, any future permit requests must automatically issue for a like display.

The Sixth Circuit's argument fails because the continued controversy relates to future requests by organizations other than the Klan. A subsequent request by a mainline religious group might not be met with government resistance. At that moment the analysis will not be the reasonable observer, knowledgeable about local events in 1993; rather it will be a reasonable observer then seeing a cross at a location clearly identified with the core functions of state government.

County of Allegheny involved a creche located at the "seat of government." Justice Blackmun observed how the court of appeals, 842 F.2d 655, 662 (3d Cir. 1988), had found: "Each display was located at or in a public building devoted to core functions of government." In contrasting the creche in *County of Allegheny*, Justice O'Connor observed "the creche in *Lynch* [*v. Donnelly*, 465 U.S. 668 (1984)] . . . was displayed in a private park in the city's commercial district as part of a broader display of traditional secular symbols of the holiday season, [while] this creche stands alone in the county courthouse." *County of Allegheny*, 492 U.S. at 626 (O'Connor, J., concurring in part and concurring in the judgment).[3] She further stated:

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[3]In *County of Allegheny*, Justice Stevens was concerned about even a Christmas tree "[s]tanding alone in front of governmental headquarters." 492 U.S. at 654 (Stevens, J.,

> The display of religious symbols in public areas of core government buildings runs a special risk of "mak[ing] religion relevant, in reality or public perception, to status in the political community." *Lynch*, *supra*, at 692.

Id.

Rather than the per se analysis of the courts below, this Court must require, as the Constitution demands, careful scrutiny of "the nature, size, location, and duration of the display, and its relation to the symbolic center of government" in determining whether there exists the appearance of a government imprimatur on a religious symbol. *Smith v. County of Albermarle, Virginia*, 895 F.2d 953, 959 n.6 (4th Cir. 1990).

Absent such an analysis, the Free Speech Clause would be permitted to subsume the Establishment Clause, leaving a meaningless shell. In his scholarly dissent in *Americans United*, 980 F.2d at 1558, Judge Lively rejected the concept that the Establishment Clause must always accommodate the Free Speech Clause:

> I believe the accommodation should be the other way around, because as Justice Kennedy recognized, the Establishment Clause stands apart within the First Amendment as a specific prohibition against certain state activities, and there is no exact counterpart in the speech provisions. Thus, I believe that the public forum concept must accommodate the proscriptions of the Establishment Clause.

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concurring in part and dissenting in part).

Kaplan v. City of Burlington, 891 F.2d 1024, 1029 (2d Cir. 1989), dismissed the argument that there was "an absolute constitutional right to engage in symbolic expressive conduct in a public forum such as City Hall Park, limited only by narrow time, place and manner regulations." According to the court, "[i]f this were so . . . the public forum doctrine would swallow up the Establishment Clause . . . . The existence of a public forum is simply a factor to be taken into account in determining whether the context of the display suggests government endorsement." *Id.* The Second Circuit distinguished the placement of a religious symbol at the seat of government from the equal access decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), noting that in *Widmar* the existence of a public forum began, rather than ended, the Court's analysis. *Kaplan*, 891 F.2d at 1029. Distinguishing a stand alone religious symbol from the Court's concern in *Widmar*, the Second Circuit in *Kaplan* noted:

> Central to the Court's conclusion in *Widmar* that an equal-access policy on the part of the university would not violate the Establishment Clause was the factor that "an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices," any more than such a policy confers approval on such eligible groups as the "Students for a Democratic Society [or] the Young Socialist Alliance." 454 U.S. at 274. The same cannot be said of the City's permission to display an unattended, solitary religious symbol in City Hall Park, given that Park's close association with the seat of city government.

Id. at 1030.

In the instant case, once the Klan erected the Latin cross in furtherance of its general purpose to "establish a Christian government in America," a group of Christian ministers sought permission to erect 20 more Latin crosses in front of the Ohio State House. Numerous crosses were displayed including a Greek Orthodox cross. If a reasonable observer did not believe the state had endorsed the quintessential Christian religious symbol when the Klan erected the Latin cross, what was that observer to conclude with the subsequent erection of additional Latin crosses and a Greek Orthodox cross by local churches? As Justice O'Connor noted in her concurring opinion in *Lynch v. Donnelly*:

> Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion. In making that determination, courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded. Government practices that purport to celebrate or acknowledge events with religious significance must be subjected to careful judicial scrutiny.

Id. at 694.

Unlike the creche in *Lynch*, a myriad of Christian crosses on the Ohio State House grounds could not reasonably have been viewed as a mere part of an overall holiday setting. The cumulative impact of numerous crosses certainly

exacerbated, rather than negated, a message of endorsement.[4] For as the court in *ACLU of Mississippi v. Mississippi State General Serv. Admin.*, 652 F. Supp. 380, 384 (S.D. Miss. 1987), found "[t]he cross is a sectarian symbol with no secular

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[4]Numerous cases have suggested the cross is not a traditional Christmas symbol. In *ACLU of Illinois v. City of St. Charles*, 622 F. Supp. 1542, 1545 (N.D. Ill. 1985), the court noted that "unlike the creche, a cross on a building, even during the Christmas season, does not ordinarily conjure up in a viewer's mind the historical antecedents of the Christmas holiday. Indeed, many Christian church buildings display the latin cross to indicate that the building is in fact a church. For this reason, among others, a cross on a building has come to have religious meaning in our society separate from any religious holiday." That court also concluded "unlike a creche, a cross is not commonly found displayed in the midst of purely secular symbols of the Christmas holiday. And unlike a creche which is traditionally displayed only at Christmas time, a cross is displayed year-round on buildings associated with the Christian religion (e.g., churches and parochial schools) for the purpose of conveying the message that the building is associated with the Christian religion." *Id.* at 1546. In *Mendelson v. City of St. Cloud*, 719 F. Supp. 1065, 1069 (M.D. Fla. 1989), that court noted "[t]he Latin cross is unmistakably a universal symbol of Christianity. . . Such a cross has always been a symbol of Christianity, and it has never had any secular purpose." In *Greater Houston Chapter of the ACLU v. Echels*, 589 F. Supp. 222, 234-35 (S.D. Tex. 1984), the court stated "that the cross and the Star of David are the primary symbols for Christianity and Judaism respectively is beyond question. . . . The messages conveyed by these symbols are not lost when they are removed from the churches and synagogues with which they are traditionally associated."

significance." And in *Doe v. Small*, 964 F.2d 611, 613 (7th Cir. 1992) (en banc), the court recognized that a religious symbol should not be placed at the seat of government.

Two other circuits have rejected the per se analysis followed by the Sixth Circuit in this case and reasoning contained in *Americans United for Separation of Church & State v. Grand Rapids*, 980 F.2d 1538 (6th Cir. 1993) (en banc). *See Kaplan v. City of Burlington*, 891 F.2d 1024 (2d Cir. 1989), *cert. denied*, 496 U.S. 926 (1990); *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 3026 (1992); and *Smith v. Albermarle County*, 895 F.2d 953 (4th Cir.), *cert. denied*, 111 S. Ct. 74 (1990).

Further, the adoption of the per se rule adhered to below has been rejected by other courts. For instance, the reasoning of *McCreary v. Stone*, 575 F. Supp. 1112 (S.D. N.Y. 1983), is compelling although later overturned by the Second Circuit. 739 F.2d 716 (2d Cir. 1984). *McCreary* involved a private organization claiming denial of free speech and free exercise rights when refused access to a village-owned park to display a privately owned nativity scene. The village in *McCreary*, like petitioners here, "argu[ed] the denial was necessary to serve a compelling state interest because to allow the erection of the creche on public property would violate the Establishment Clause of the First Amendment. . . ." *McCreary*, 575 F. Supp. at 1126.

The district judge rejected any reliance on *Widmar*, distinguishing *Widmar*: "[R]eligious speech was to take place at 'group[] meeting[s]' and consist of 'discourse' by 'speakers,' and 2) the forum in which the speech would occur would be university facilities, presumably classrooms and meeting rooms. . . ." *Id.* at 1128 (citation omitted).

However, in discussing the erection of a stand-alone creche, the court observed:

> In contrast, the instant case involves 1) religious speech in the form of a physical structure which for ten to fourteen days is to convey its adherents' message, twenty-four hours a day, even in their absence, and 2) is to do so in a public park visited by persons "of all stripes," clearly including children.

Id. at 1128. In finding such a creche in a public park had the primary effect of advancing religion, the trial court turned to prior decisions of this Court which "'recognize that government sponsorship of religious beliefs can occur in ways far more subtle than endowing state churches or mandating acceptance of certain religious rites or tenets.'" *Id.* at 1130 (citation omitted). In *McCreary* "'the mere *appearance* of a joint exercise of . . . authority by Church and State provides a significant symbolic benefit to religion' and therefore may impermissibly advance religion." *Id.* (citation omitted).

Of interest to this case was *McCreary's* analysis of *Widmar*:

> First, in contrast to cases like *Widmar* where speech derives from the simultaneous efforts and actions of those who have gathered to engage in it, when a symbol is placed on public land the land performs an added and enhanced *function*. No longer is the land just a place from which a message can be proclaimed; when a symbol is left on public land the land actually becomes the message bearer. This means that public resources are substituted for

> personal conduct as a way of generating the speech. . . .
>
> The second way in which permitting the creche for ten days would advance religion is closely related. Because when a symbol is implanted on public land that land uniquely becomes the message bearer, and because, concomitantly, there are no persons present to whom the receiver of the religious message can attribute the speech, the possibility that those receiving the message will assume it is supported by the state is particularly present.

Id. at 1130-31 (emphasis in original).[5]

Judge Boyce F. Martin, Jr., in his dissent in *Americans United*, 980 F.2d at 1555, observed "[t]he First Amendment protects [a religious organization's] right to say anything it

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[5]The district court in *McCreary* rejected the idea that the placement of a sign next to the religious symbol could cure the constitutional infirmity, stating "[t]he advancement problems are not cured by the placement of a sign next to the creche. First, a sign does not solve the problem of public land taking over the function of message bearer from adherents. Second, it is doubtful that a sign saying that a symbol has been 'erected and maintained' by a private group will entirely eliminate the appearance of state support when public land is still the one visible thing to which the speech may be attributed." 575 F. Supp. 1132-33. In the instant case the location of a sign adjacent to a single cross or a row of twenty crosses will go unnoticed during wintery days and nights in Ohio's capital city frequented not only by residents but visitors unfamiliar with local community squabbles.

wants to say [in a public forum], but the First Amendment does not mandate allowing [a religious organization] to leave a religious symbol, which creates the appearance of government-endorsed religion, on the [public] square." In discussing the relevance of the equal access statute validated in *Board of Educ. v. Mergens*, 496 U.S. 226 (1990), also in dissent, Judge Lively observed "[i]f the sponsoring group of the religious discussions in *Mergens* had erected and left unattended for a period of time a large religious sign in front of the school, or in a classroom, I believe *Lynch* and *Allegheny County* would require a different result." *Americans United*, 980 F.2d at 1560 (Lively, J., dissenting).

Justice O'Connor shares these concerns. In *County of Allegheny*, she suggests there is a "need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed or attempted to convey a message that religion or a particular religious belief is favored or preferred." *Id.* at 637.[6]

Regardless of the government's purpose here, a significant portion of the potentially large audience observing the Latin cross on the State House grounds will conclude the state is endorsing religion in general and Christianity in particular. *See Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). As Justice O'Connor noted, "the endorsement standard recognizes that the religious liberty so

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[6]In *County of Allegheny* Justice Stevens believed: "the Establishment Clause should be construed to create a strong presumption against the display of religious symbols on public property. There is always a risk that such symbols will offend nonmembers of the faith being advertised as well as adherents who consider the particular advertisement disrespectful." *Id.* at 650-51.

precious to citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others. *County of Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring in part and concurring in the judgment).

Ohio's decision on whether to permit the placement of a stand alone Latin cross at the seat of state government should be deemed to implicate compelling state interests related to the First Amendment's Establishment Clause. Of course, any exclusion must be narrowly tailored. As Justice O'Connor noted in *County of Allegheny*: "Clearly the government can *acknowledge* the role of religion in our society in numerous ways that do not amount to an endorsement." *Id.* "[A] prohibition limited to displays of unattended, solitary religious symbols on public property would be narrowly tailored to serve . . . [the constitutional mandate of the Establishment Clause] since it would allow the continued use of . . . [the seat of government] for all other uses." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1030 (2d Cir. 1989).

The Supreme Court in *Lynch* and *County of Allegheny* permitted recognition of the role of religion in our society without adopting a per se rule validating the exclusive placement of Christianity's universal symbol. However, in the event the majority of this Court concludes a nongovernmental organization or individual should, under the Free Speech Clause, be entitled to retain an undiluted religious display on public property, one alternative would be to require the placement of such religious items on property not as clearly associated with state government as the State Capitol building. Arguably, such an option would allow ample alternative channels of communication.

II. THE EQUAL PROTECTION CLAUSE DOES NOT MANDATE CONTINUED VIOLATIONS OF THE ESTABLISHMENT CLAUSE.

The Fourteenth Amendment's Equal Protection Clause does not require this Court to permit the continued violation of no-establishment principles. Even if prior Establishment Clause violations have occurred, the remedy is not to expand the scope of constitutional violation but to eliminate it as to all groups. As Justice O'Connor noted in *County in Allegheny*:

> Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment. As we recognized in *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 678 (1970): "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."

492 U.S. at 630.

In December of 1993 when the controversy existed between Ohio's Capitol Square Review and Advisory Board and the Ku Klux Klan, citizens of Ohio may not have felt threatened by the erection of a single Latin cross. However, the placement of additional crosses by local churches presents a significant new development. Nevertheless, "if [a Klan cross] is allowed, it would also seem permissible to display,

standing alone, a symbol [placed there through the efforts of a majority faith which] . . . could well lead members of minority religions or nonbelievers to think that '"adherence to a religion"' was relevant to '"standing in the political community."'" *Kaplan v. City of Burlington*, 891 F.2d at 1030 (citations omitted).

As the Sixth Circuit correctly noted in *ACLU v. City of Birmingham*, 791 F.2d 1561, 1566 (6th Cir. 1986):

> Since the majority does not need its protections, the Bill of Rights was adopted for the benefit and protection of minorities. From the beginning, Christians have constituted a majority in America and non-Christians are acutely aware of this fact. Their assurance of equality before the law, despite their religious nonconformance, derives from the guarantees of the First Amendment.

Paraphrasing the Sixth Circuit in *City of Birmingham*, a non-Christian would believe a display of a lone Latin cross near a State Capitol entrance, whether provided or financed by a nongovernmental party, meant the state was endorsing Christianity. A symbol thus displayed

> sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.

Lynch v. Donnelly, 465 U.S. at 688 (O'Connor, J., concurring).

As Judge Lively answered the majority in *Americans United*, 980 F.2d at 1564:

> To accept the majority's construction of the interplay between Establishment Clause principles and the public forum doctrine would turn the Establishment Clause into a paper screen rather than the bulwark of separation between church and state it was intended to be.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Sixth Circuit must be reversed.

Dated: February 23, 1995

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Supreme Court of the United States

October Term, 1994

CAPITOL SQUARE AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SHELLENBARGER and OHIO SENATOR RICHARD T. FINAN,

Petitioners,

vs.

VINCENT J. PINETTE, DONNIE A. CARR and KNIGHTS OF THE KU KLUX KLAN,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICUS CURIAE* OF THE TOWN OF TRUMBULL, CONNECTICUT AND THE CONNECTICUT CIVIL LIBERTIES UNION FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

The Town of Trumbull, Connecticut ("the Town"), a political subdivision of the State of Connecticut, is presently a defendant-respondent in a closely similar lawsuit in which the plaintiffs — having lost at the district and circuit court levels — have petitioned this Court for certiorari. *Knights of Columbus No. 2961 et al. v. The Town of Trumbull, Connecticut, et al.*, No. 94-1241. The issue in *Knights of Columbus* is essentially the same as the one at bar: namely, whether the First Amendment's Speech Clause requires, and the Amendment's Establishment Clause permits, a government agency to let a private entity display a solitary, unattended religious symbol in a traditional public forum that abuts a core government building, when the forum is open to privately-sponsored unattended non-religious symbols.[2] Thus, the outcome in the present case could have a significant impact upon — and indeed could control — the outcome in *Knights of Columbus*.

The Connecticut Civil Liberties Union Foundation ("CCLUF") is the litigative arm of the Connecticut Civil Liberties Union, a state affiliate of the American Civil Liberties

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1. Under Rule 37.5, it is not necessary for the parties to consent to the filing of this Brief by the Town of Trumbull, as the Town is a subdivision of the State of Connecticut and the Brief is submitted by its authorized law officer. As to the Connecticut Civil Liberties Union Foundation, the Respondents' blanket consent to all amicus filings has been lodged with the Clerk's office, and Petitioners' Counsel Andrew I. Sutter has represented to the amici that the Petitioners' consent will be lodged forthwith.

2. Indeed, *Knights of Columbus* presents this issue in even more pristine form, because the Trumbull Town Hall Green — the situs of the controversy — is not open to the display of *any* solitary unattended religious symbol; the symbol that the plaintiffs wish to display (a creche) is a seasonal one; and the plaintiffs do not allege that the Town denied permission to display the symbol out of hostility to the sponsor's political views. Given these factual differences, this Court could actually decide the present appeal without reaching the certified issue.

Union, which is a national non-partisan organization of approximately 250,000 members committed to protecting the civil rights and liberties — and in particular the First Amendment rights and liberties — of all persons. CCLUF has participated, as direct counsel or *amicus,* in the litigation of numerous cases involving speech and religion clause rights in Connecticut's federal and state courts, and appeared as *amicus curiae* in *Knights of Columbus,* before the district court, in support of the Town. CCLUF believes that, because public parks and streets are traditionally and universally known to be public forums, ordinarily there is no Establishment Clause violation when they are used for activities or speech with a religious content. However, CCLUF also believes that the placement of a *solitary, unattended* religious symbol in a park adjacent to a *core government building* is not an ordinary use, but rather suggests official endorsement of the religious message, and that the Sixth Circuit, by holding otherwise, gave insufficient weight to the Establishment Clause values in the case. Accordingly, CCLUF joins the Town of Trumbull in supporting the Petitioners and in urging that the judgment be reversed.

STATEMENT OF THE CASE

The *amici* adopt the Statement of the Case in the Petitioners' Petition For a Writ of Certiorari, pages 4 through 9.

SUMMARY OF ARGUMENT

The Sixth Circuit erred at the outset by applying a categorical rule which elevates speech rights above non-establishment rights. Since these rights stand — like all First Amendment rights — on an equal footing with one another, the court should have undertaken, instead, to strike a balance between the two, giving close attention to context.

Had the Sixth Circuit applied such a balancing test, as it ought to have done, the balance would have tilted, in this case, in

the Petitioners' favor. The Respondents' expressive interests are at best minimal, because the ability to leave a symbol unattended merely "facilitates" the expression; it does not enhance the symbol's expressive content. Their expressive interests are further diminished by the fact that there is no inherent right to place an unattended symbol in any forum, even a traditional public forum. Indeed, a speaker has no more right to display such a symbol than to demand that the government subsidize his expression with cash.

On the Establishment Clause side, the endorsement test, which a majority of this Court has adopted in the past and which the Court should use in this case, requires only that a reasonable person be capable of inferring endorsement or disapproval from the government's actions; not that all reasonable persons would necessarily do so. The very split among the Circuits, on the question of whether accommodating unattended and solitary religious displays in front of core government buildings violates the Establishment Clause, suggests that the perception of endorsement or disapproval is not unreasonable. The endorsement concerns are exacerbated by the fact that most unattended displays are likely to be (and indeed have been) religious, and by the further fact that governmental accommodation of unattended displays operates very much like a cash subsidy. It is no answer to say that the unwilling viewer can simply turn away, for the Establishment Clause's unique prohibition on religious speech lifts this burden from the viewer's shoulders. Finally, it is incorrect to argue that unattended displays are less likely to convey endorsement than are time-honored practices such as legislative prayer and presidential proclamations of prayer; on the contrary, such displays are far likelier to do so.

ARGUMENT

I.

THE SIXTH CIRCUIT ERRED BY CATEGORICALLY SUBORDINATING THE ESTABLISHMENT CLAUSE TO THE SPEECH CLAUSE INSTEAD OF STRIKING A CAREFUL CONTEXTUAL BALANCE BETWEEN THE TWO.

The Sixth Circuit's error originates in its adoption of a categorical rule which assumes, in essence, that speech values trump non-establishment ones on all public forum property. This assumption is incorrect. Though First Amendment rights as a whole occupy a "preferred position" in relation to other constitutional rights, no single First Amendment right is "preferred" to any or all of the rest.

> [It] may be doubted that any of the great liberties insured by the First Amendment can be given higher place than the others. All have preferred position in our basic scheme. *Schneider v. State,* 308 U.S. 147; *Cantwell v. Connecticut,* 310 U.S. 296. All are interwoven there together. Differences there are, in them and in the modes appropriate for their exercise. But they have unity in the charter's prime place because they have unity in their human sources and functionings.

Wallace v. Jaffree, 472 U.S. 38, 50 n.35, *quoting Prince v. Massachusetts,* 321 U.S. 158, 164 (1944) (quotation marks omitted). On the same page, *Wallace* explains the "unity" as follows: "the individual's freedom of conscience [is] the central liberty that unifies the various Clauses in the First Amendment."

Id. In other words, the Establishment Clause, no less than the speech clause, serves to protect society's "marginal voices." *International Society For Krishna Consciousness v. Lee,* 504 U.S. ___, 112 S. Ct. 2701, 2720 (Kennedy, J., concurring).[3]

Once it is understood that all First Amendment rights stand on the same footing, it follows that the proper course, when they collide, is not to subordinate one to the other. Rather, courts should strike careful balances, with close attention to context. Indeed, this Court has called for fact-sensitive balancing even when First Amendment speech rights clash with non-First Amendment rights. *See, Roberts v. U.S. Jaycees,* 468 U.S. 609, 623 (1984); *Nebraska Press Association v. Stuart,* 427 U.S. 539, 561, 570 (1976); *Simon and Schuster, Inc. v. New York State Crime Victims' Board,* 502 U.S. ___, 112 S. Ct. 501, 514 (1991) (Kennedy, J., concurring). Such balancing is all the more imperative, therefore, when First Amendment rights clash with one another. *Burson v. Freeman,* 503 U.S. ___, 112 S. Ct. 1846, 1859 (1992) (Kennedy, J., concurring) (speech versus voting rights).[4]

The Sixth Circuit's categorical approach is thus in error. In the remainder of this Brief, the *amici* will show that if the court had balanced speech and non-establishment rights, as it ought to have done, it would have ruled in the Petitioners' favor.

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3. For other decisions harmonizing, and thereby equating, the First Amendment's various clauses, *see Employment Div., Ore. Dept. of Human Resources v. Smith,* 494 U.S. 872, 886 n.3 (1990) (Speech and Free Exercise Clauses); *McDonald v. Smith,* 472 U.S. 479, 482 (1985) (Speech and Petition Clauses).

4. As a general matter, moreover, Establishment Clause jurisprudence "is necessarily one of line-drawing," *Lee v. Weisman,* 504 U.S. ___, 112 S. Ct. 2649, 2661 (1992) — a process which is the direct antithesis of the categorical technique which the Sixth Circuit embraced.

II.

ON BALANCE, THE ESTABLISHMENT CLAUSE FORBIDS THE DISPLAY OF SOLITARY, UNATTENDED RELIGIOUS SYMBOLS — EVEN PRIVATELY SPONSORED ONES — IN PUBLIC FORUMS THAT ABUT CORE GOVERNMENT BUILDINGS.

This section of the Brief will apply the balancing process which the case requires against the backdrop of the endorsement test which a majority of this Court used in *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 389-92 (1985), and again in *Allegheny County v. Greater Pittsburgh ACLU,* 492 U.S. 573, 592-94 (1989). For the most part the *amici* will leave to the Petitioners and other *amici* — *e.g.* Americans United For Separation of Church and State — the task of explaining the reasons (including but not limited to *stare decisis*) why that test is the proper one, especially in cases involving the public display of religious symbols.[5]

In Part 1 of the Section, the *amici* will show that a speaker's expressive interest in displaying an unattended, as opposed to an attended, symbol is minimal to non-existent. In Part 2, they will show that the countervailing endorsement concerns, on the Establishment Clause side of the equation, are powerful and overriding.

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5. "As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law." *Allegheny County,* 492 U.S. at 668 (Kennedy, J., concurring). *Accord, Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. ___, 112 S. Ct. 2791, 2808-09 (1992).

A. A Speaker Has No *Expressive* Interest In Displaying an Unattended, As Opposed To an Attended, Symbol.

A speaker simply has no *expressive* interest in displaying an unattended, as opposed to an attended, symbol. Rather, the only interest is "facilitative." *Clark v. Community For Creative Non-Violence,* 468 U.S. 288, 296 (1984). Leaving the symbol unattended makes it easier, more convenient, and more comfortable to display the symbol, especially overnight or in inclement weather. But it does not enhance the symbol's *expressive* content, any more than sleeping overnight at the site of the demonstration enhanced the expressive content in *Clark.* As *Clark* squarely holds, this Court attaches little or no weight to a merely "facilitative" interest in a particular manner of expression.

Indeed, the absence of a live speaker, in the present case, could actually detract from the message that the symbol's sponsors seek to convey, which is that they themselves — not government officials — are "expressing respect for the holiday season and [asserting] the right of all religious views to be heard." *Pinette v. Capitol Square Review and Advisory Board,* 844 F. Supp. 1182, 1183-84 (S.D. Ohio 1993) (Finding of Fact no. 11). By suggesting government sponsorship, an unattended religious symbol next to a core government building obscures and distorts that message.

Because the expressive benefits of unattended symbolic speech are so marginal, there is no inherent right to display such symbols even in traditional public fora. That is the clear import of *City Council v. Taxpayers For Vincent,* 466 U.S. 789 (1984), where this Court upheld an ordinance that banned the posting of signs on public property. Though the opinion observed that utility poles (where the speakers wished to display their signs) were non-fora, *id.* at 814, it is quite evident that the ban would have survived time, place and manner analysis even if the Court had

characterized the forum as consisting of the municipal streets and sidewalks where the poles stood. *Id.* at 813-15.[6] The absence of any inherent right to display unattended exhibits, even in traditional public fora, has three distinct consequences that are germane to this lawsuit.

First: it is further evidence that the speaker's interests are of little or no weight.

Second: because one may erect unattended displays only when the government voluntarily allows such displays, the appropriate analysis in this case is really that of the non-forum or possibly the designated forum, even though the situs is a traditional forum for purposes of live speech.[7] The non-forum methodology is probably more appropriate, for while the opinions below mention some instances in which the situs

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6. The speaker's interests in *Vincent* were actually much stronger than in the case at bar. For one thing, the signs in that case comprised pure speech, not symbolic; for another, the City, by banning such signs, at least arguably closed down a "discrete medium of expression." 466 U.S. at 815 n.32 In *City of Ladue v. Gilleo,* 514 U.S. ___, 114 S. Ct. 2038, 2045 (1994), this Court only last term held such closures suspect.

7. Interestingly, a United States district judge, in *Flamer v. City of White Plains,* 841 F. Supp. 1365, 1374 (S.D.N.Y. 1993), criticized the Second Circuit for having "conflate[d]" so-called limited forums with traditional forums in *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir. 1989), *cert. denied,* 496 U.S. 926 (1990) — the decision which committed that Circuit to the view that unattended solitary religious displays which stand next to core government buildings invariably violate the Establishment Clause. The "confla[tion]" occurred, according to *Flamer,* because *Kaplan,* though it did not use limited forum vocabulary, nevertheless focused on whether the municipal defendant had opened its Town Hall park to the display of unattended symbols. Indeed *Kaplan* "conflate[d]" the two forums — but the "confla[tion]" does not reflect error, ambiguity or confusion on *Kaplan's* part. Rather, it recognizes that a traditional forum, which is open by right only to live speakers, may be further opened, by voluntary government action, to additional speech uses.

accommodated unattended exhibits, 844 F. Supp. at 1184, Finding of Fact no. 13, those instances seem too few and too isolated to show that the Petitioners have intentionally "designated" the property for such uses. *See, Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 790, 802 (1985); *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47-8 (1983).[8] It is ultimately unnecessary, however, for the *amici* to assign one label or the other, or to answer the unresolved question of whether the government may "limit" a designation to as few or as many topics as the government wishes. *See, Lamb's Chapel v. Center Moriches Union Free School District,* 509 U.S. ___, 113 S. Ct. 2141, 2146 (1993). What matters for present purposes is that, under either analysis, this Court's cases accord considerable deference to governmental decisions as to what voluntary expressive uses the government is willing to countenance, provided that the decisions are rational and viewpoint neutral. *Lamb's Chapel,* 113 S. Ct. at 2147; *International Society For Krishna Consciousness v. Lee,* 112 S. Ct. at 2705-06. That deference, in combination with the low incremental value of unattended symbolic speech and the endorsement concerns which the *amici* will discuss below,

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8. In fact, the only arguably unattended "expressive" symbols to appear on the property, other than religious symbols, were a United Way campaign thermometer and a Christmas tree (assuming the latter to have been privately rather than government-sponsored). 844 F. Supp. at 1184, Finding of Fact no. 13. As for the "craftsmen's booths and displays" which the Finding describes, these necessarily would have been attended much of the time, and in any event do not appear to have been "expressive" in the First Amendment sense of the term. This sparse history no only militates against any suggestion that the Petitioners have opened the property to general use by sponsors of unattended symbols but — because the few such symbols that have appeared have been predominantly religious — raises endorsement concerns which the *amici* will discuss in Part 2 of this Section.

should support the Petitioners' refusal to allow the Respondents' cross.[9]

Third: since the government is under no constitutional duty to countenance unattended expressive symbols on its property, if it does make property available for the display of such symbols, its decision to do so is really in the nature of a subsidy. This Court, of course, is considering right now the Speech and Establishment Clause ramifications of the government's refusal to extend generally available subsidies to religious speech. *Rosenberger v. Rector and Visitors of the University of Virginia,* 18 F.3d 269 (4th Cir. 1994), *cert. granted,* 115 S. Ct. 417 (1994). In the next subsection of this Brief, the *amici* will discuss the Establishment Clause implications of that issue in more detail. On the speech side, suffice it to say that because the First Amendment creates no entitlement to government subsidies, *see, Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983), the Respondents' speech interests, once again, are constitutionally insignificant.

For all of these reasons, this Court should attach little if any weight to Respondents' desire to facilitate their symbolic religious expression (which the First Amendment assuredly

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9. The display of a menorah on the same property is at first glance troubling, since it suggests viewpoint discrimination within a genre of permitted speech. *See, Lamb's Chapel,* 113 S. Ct. at 2147-48. Conjoined as it was with a Christmas tree, however, 30 F.3d at 676, the menorah may well have conformed to the requirements in *Allegheny County.* That would differentiate it, in genre, from the cross. If, on the other hand, it did not conform to *Allegheny,* then it, no less than the cross, violated the Establishment Clause, in which case this Court should not remedy a past constitutional wrong by countenancing another. This problem, incidentally, does not exist in the Town of Trumbull's *Knights of Columbus* case, for there the property is closed to all unattended religious symbols. *Knights of Columbus Council No. 2961 v. The Town of Trumbull, Connecticut et al.,* Civ. No. 3:94CV2143(AHN) (D. Conn. Dec. 20, 1994), Memorandum of Decision at 5, Finding of Fact no. 16.

would protect, and which the Petitioners presumably would accommodate, if a live sponsor were present) by leaving the symbol unattended. The *amici* will now show that this desire, besides carrying little or no weight, creates Establishment Clause (*i.e.*, endorsement) concerns of the highest order.

B. The Endorsement Concerns Which This Court Should Balance Against the Speaker's Minimal Expressive Interests Are Powerful and Overriding.

The Sixth Circuit, and apparently the Respondents, take the position that a privately-sponsored religious symbol in a public forum can never convey a message of official endorsement of religion. This is because, in their view, a reasonable person who sees the display will understand that the government maintains an open-forum policy and that the display therefore represents only the opinions of the private sponsor. *Pinette v. Capitol Square Review and Advisory Board,* 30 F.3d 675, 679 (6th Cir. 1994). This facile dismissal of endorsement concerns misperceives what endorsement means.

According to the endorsement test, the Establishment Clause does not merely prohibit government from taking "a position on questions of religious belief," *Allegheny County,* 492 U.S. at 593-94; it prohibits government from even "*appearing*" to do so. *Id.* (emphasis added, citation omitted). Moreover, the key determinant of whether the appearance arises is whether "the challenged governmental action is sufficiently *likely* to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices," and not whether the perception is inevitable or indisputable. *Id.* at 597 (citation and internal quotes omitted, emphasis added). Thus, it is not necessary that a reasonable observer *would* perceive the governmental action as connoting endorsement or disapproval, for reasonable people will often differ; rather, the government has erred whenever a

reasonable person *could* perceive its action as connoting endorsement or disapproval. *Id.* at 642-43 (concurring opinion of Justices Brennan, Marshall and Stevens). *Cf., Lee v. Weisman,* 112 S. Ct. at 2658, which agrees that — whether the test be endorsement or coercion — the controlling issue is what a reasonable person *could* perceive and not what she necessarily *would* perceive.

The Fourth and Second Circuits have squarely held, and the Seventh has intimated, that solitary, unattended, privately-sponsored religious symbols in front of core government buildings — with or without accompanying disclaimers — appear (or at least could reasonably be seen to appear) to carry government approval. *Smith v. Albemarle County,* 895 F.2d 953 (4th Cir.), *cert. denied,* 111 S. Ct. 74 (1990); *Kaplan v. City of Burlington,* 891 F.2d 1024 (2d Cir. 1989), *cert. denied,* 496 U.S. 926 (1990); *Doe v. Small,* 964 F.2d 611, 619 (7th Cir. 1992) (en banc). To be sure, two Circuits have found no endorsement: the Sixth, in its opinion below, and Eleventh, in *Chabad-Lubavitch of Georgia v. Miller,* 5 F.3d 1383 (11th Cir. 1993) (en banc). But this very division among the Circuits suggests that reasonable people could indeed perceive endorsement. Otherwise, one must ascribe to three federal circuits, as well as to the successful litigants, not merely misperception, but utter unreason.

The endorsement concerns in this case are magnified by two factors. One is the likelihood that the great majority of unattended expressive symbols in public fora will, in fact, be religious: a likelihood that the record below confirms. The district court mentions just two privately-sponsored unattended displays besides the menorah and the creche: a United Way thermometer and craft booths at an art festival. *Pinette v. Capitol Square Review and Advisory Bd.,* 844 F. Supp. 1182, 1184 (S.D. Ohio 1993), Finding of Fact no. 13. Of these, only the thermometer is even arguably expressive. *Pinette* is not unique in this regard;

cases from other circuits reveal similar patterns.[10] In *Widmar v. Vincent*, 454 U.S. 263, 277 (1981), the Court qualified its holding by intimating that the outcome would have been different had there been "empirical evidence that religious groups will dominate . . . [the] open forum" — and *Widmar* involved live speakers, whose presence mitigated endorsement concerns at least to some extent. The case histories in the Sixth Circuit and elsewhere contain ample "empirical evidence" of religious domination to satisfy the *Widmar* exception.

The endorsement dangers are exacerbated, in *Pinette*, by a second factor: namely, that (as the *amici* have demonstrated above) governmental accommodation of semi-permanent unattended exhibits operates very much like a cash subsidy. The issue in this case, therefore, begins to resemble the one in *Rosenberger, supra*: that is, when the government voluntarily subsidizes non-religious activity, does the Speech Clause require it, or does the Establishment Clause forbid it, to subsidize religious activity as well? But the Establishment Clause concerns, in *Pinette*, are far greater than in *Rosenberger*. For one thing, there are manifest differences between a journal and a purely religious symbol, because a journal is likelier to convey diffuse messages. For another, the journal's readers may not even be aware of the subsidy, whereas when unattended and solitary religious symbols appear on government property in close

10. In the *amici's* own case, *Knights of Columbus*, Civ. No. 3:94-CV2143 (AHN), no unattended symbols had ever been displayed on the property, as far as the record reveals. Memorandum of Decision at 11, Finding of Fact no. 11. The same was true in *Doe v. Small*, 964 F.2d at 614. In *Smith v. Albemarle County*, the only unattended display, besides the religious one, had been a United Way thermometer. 895 F.2d at 955. In *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d at 1383, the court mentions just three other unattended exhibits: an Indian hut during Indian Heritage Week, a 35-flag display during International Week, and a 41-poster exhibit by the Atlanta Jewish Federation; of these, only the latter appears to have been "expressive" in the First Amendment sense.

proximity to core government buildings, the church-state relationship is apparent for all to see. And of course, there were many more non-religious uses in *Rosenberger* than there are, or are ever likely to be, in the case at bar. 18 F.3d at 271; *see, Widmar,* 454 U.S. at 274.

It is no answer to say, as some Justices have argued, that those who do not want to see religious display can simply turn away from it. *Allegheny County,* 492 U.S. at 664 (dissenting opinion of Justice Kennedy, joined by the Chief Justice and Justices White and Scalia). That, to be sure, is the proper answer to those who take umbrage at *non-religious* expressive displays on government property. *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210-11 (1975); *Cohen v. California,* 403 U.S. 15, 21 (1971). But the balance between speech rights and unwilling audience rights is unaffected, in those cases, by the Establishment Clause's unique prohibition on any religious speech that can reasonably be imputed to the government. This unique prohibition, and its underlying solicitude for impacts on "marginal voices," *International Society For Krishna Consciousness v. Lee,* 112 S. Ct. at 2720 (Kennedy, J., concurring), alters the balance, for once the non-adherent receives the endorsement message, that message is not soon forgotten.

Some Justices have also questioned the endorsement test itself, on the ground that the test, if honestly applied, would require the Court to invalidate long-accepted practices such as legislative prayer, *Marsh v. Chambers,* 463 U.S. 783 (1983), and presidential prayer proclamations. *Allegheny County,* 492 U.S. at 670-74 (dissenting opinion of Justice Kennedy, joined by the Chief Justice and Justices White and Scalia); *Lee v. Weisman,* 112 S. Ct. at 2679-80 (dissenting opinion of Justice Scalia, joined by the Chief Justice and Justices White and Thomas). But in truth the prayers and proclamations are far more innocuous, for they

involve live speakers, are easily avoidable, and in any event are short-lived; they are, on these accounts, *de minimis*. *Lee v. Weisman*, 112 S. Ct. at 2670 n.3, 2678 (concurring opinion of Justice Souter, joined by Justices Stevens and O'Connor).

In contrast, religious symbols on government property are powerful, unavoidable, and semi-permanent. When such symbols are unattended, and stand in close proximity to government buildings, they have a particular propensity to suggest a " 'symbolic union of church and state,' " *Lee v. Weisman*, 112 S. Ct. at 2672 (concurring opinion of Justice Souter, joined by Justices Stevens and O'Connor), and thereby to alienate and intimidate society's "marginal voices." *International Society For Krishna Consciousness v. Lee*, 112 S. Ct. at 2720 (Kennedy, J., concurring). If the private exhibitors of these symbols truly do not wish to convey such a message — if they desire, instead, that their religious expression be perceived as their own — then the absence of a live sponsor in no way enhances that expression and indeed can obscure and distort it. *See*, Section IV-B-1, *supra*. And if the exhibitors do wish to convey such a message, the short answer is that this is not the sort of message which the Establishment Clause tolerates. *Lee v. Weisman*, 112 S. Ct. at 2678 (concurring opinion of Justice Souter, joined by Justices Stevens and O'Connor).

In sum, the speech rights which the speaker asserts in this case are marginal to nil, and there is significant potential for creating the appearance that the government is endorsing religion. In the circumstances, therefore, the speech values must yield to the non-establishment ones and the display should be disallowed.

CONCLUSION

For all the above-stated reasons, the judgment of the Sixth Circuit should be reversed, and the case should be remanded with instructions to dismiss the Respondents' Complaint.

Respectfully submitted,

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